DOCKET

No. 87-2013-CFX Title: Board of Trustees of the State University of New York, et al., Petitioners
Status: GRANTED v.
Todd Fox, et al.

Docketed:
June 9, 1988 Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Sherwood,O. Peter

Counsel for respondent: Reath,Henry T.

Entry	Date	Note	Proceedings and Orders
1	Jun 9 1988	G	Petition for writ of certiorari filed.
3	Jun 12 1988	X	Brief amici curiae of University of California, et al. filed.
5	Jul 11 1988	X	Brief amicus curiae of American Future Systems, Inc. filed.
6	Jul 11 1988	X	Brief of respondents Todd Fox, et al. in opposition filed.
2	Jul 12 1988	X	Brief amici curiae of American Council on Education, et al. filed.
7	Jul 12 1988	X	Brief amicus curiae of Student Assn. of the University of New York filed.
4	Jul 13 1988		DISTRIBUTED. September 26, 1988
8	Jul 30 1988	X	Supplemental brief of respondents Todd Fox, et al. filed.
9	Aug 2 1988	X	Reply brief of petitioners Bd. of Trustees, SUNY, et al. filed.
10	Oct 3 1988		Petition GRANTED.
			**********
11	Nov 17 1988		Brief amici curiae of Board of Trustees of Univ. of Alabama, et al. filed.
12	Nov 17 1988		Brief amici curiae of American Council on Education, et al. filed.
13	Nov 17 1988		Brief amicus curiae of AFL-CIO filed.
14	Nov 17 1988		Joint appendix filed.
15	Nov 17 1988		Brief of petitioners Bd. of Trustees, SUNY, et al. filed.
16	Dec 15 1988	G	Application (A88-484) by Respondents to file a in excess of page limits, submitted to Justice Marshall.
17	Dec 19 1988		Record filed.
		*	Certified copy of original record and proceedings, 2 boxes, received.
19	Dec 19 1988		Brief amicus curiae of Landmark Legal Foundation filed.
18	Dec 20 1988		Application (A88-484) granted by Justice Marshall, allowing a maximum of 57 pages.
22	Dec 20 1988		Brief amici curiae of Student Association of the State University of NY, et al. filed.
20	Dec 21 1988		Brief amici curiae of American Advertising Federation Inc., et al. filed.
21	Dec 23 1988		Brief of respondents Todd Fox, et al. filed.
23	Dec 23 1988		Record filed.
		*	Certified copy of missing documents from original recordreceived.
24	Jan 4 1989		CIRCULATED.
26	Jan 6 1989		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 22, 1989. (3RD CASE.)

No. 87-2013-CFX

Entry	Date	Note	Proceedings and Orders
27	Jan 19 1989	X	Reply brief of petitioners Bd. of Trustees, SUNY, et al. filed.
28	Feb 22 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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JUN 9 1988
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CLERK

87-2013

IN THE

Supreme Court of the United States

October Term, 1987

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General
of Counsel

Dated: June 9, 1988

Questions Presented

1. Whether the decision below, remanding the case to the District Court to consider whether the regulation of the State University of New York ("SUNY") precluding students from entertaining commercial invitees in their state-owned dormitory rooms is the "least restrictive means" available, is in conflict with a decision of the Third Circuit and not justified under this Court's decision in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York,* 447 US 557 (1980).

2. Whether SUNY's regulation prohibiting operation of private commercial enterprises on campus is valid in light of this Court's analysis of government restrictions on the use of public property in terms of the property's status as a "public forum" or "nonpublic forum".

3. Whether a state university's regulation, prohibiting in dormitory rooms and elsewhere on its campuses the operation of private commercial enterprises, is a valid time, place and manner restriction.

Parties

The parties to the proceeding in the Second Circuit Court of Appeals are:

1. Todd Fox, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan and Jaclyn Bernstein, plaintiffs-appellants in the court below.

2. American Future Systems, Inc., plaintiffs in this action in the United States District Court for the Northern District of New York, did not join co-plaintiffs' appeal.

3. The Board of Trustees of the State University of New York and D. Bruce Johnstone, individually and as Chancellor of the State University of New York[1] and The State University of New York College at Cortland, and James M. Clark, individually and as President of the College at Cortland, and The State University of New York at Binghamton, and Clifford D. Clark, individually and as President of the State University of New York at Binghamton, and The State University of New York at Albany, and Vincent O'Leary, individually and as President of the State University of New York at Albany, and The State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, individually and as President of the College of Arts and Sciences at Potsdam, defendants-appellees in the court below.

[1]Pursuant to Fed. R. App. P. Rule 43(c), D. Bruce Johnstone has been substituted for Clifton R. Wharton, who was Chancellor of the State University of New York when this action was filed.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is printed in petitioners' appendix at pages 1a-20a.[1] It is reported at 841 F2d 1207 (2d Cir 1988). The opinion of the United States District Court for the Northern District of New York is printed in petitioners' appen-

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[1]Hereafter, all numerical references followed by "a" or "b" refer to pages of the petitioner's appendix.

dix at pages 1b-33b. It is reported at 649 F Supp. 1393 (NDNY 1986).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 11, 1988.

This Court's jurisdiction is invoked under 28 USC § 1254(1).

Statement of the Case

With one exception, plaintiffs in the district court are or were students at various campuses of the State University of New York ("SUNY"). The other plaintiff, who did not join in the appeal, was American Future Systems, Inc. ("AFS"), a Pennsylvania corporation engaged in selling cookware, china and tableware to college students.

As its primary advertising and sales technique, AFS relies on group demonstrations of its products in college and university dormitory rooms. Typically it arranges such demonstrations by telephone calls to students, whose names and numbers it obtains from student directories, through referrals from prior demonstrations, or through a procedure called "chatterbooking". In "chatterbooking", an AFS representative solicits students in common areas of a campus to register for and enter a drawing for a vacation. The AFS representative follows a chatterbooking solicitation "script" and initiates the contact by inquiring whether the student has "signed up for the free Florida holiday drawing". In fact, the "free" holiday is subject to substantial restrictions and potential surcharges payable by the student. Students must list their names and telephone numbers on the drawing cards.

Having obtained student names and telephone numbers, AFS representatives then call students and attempt to arrange demonstrations of AFS products in dormitory rooms. AFS seeks a student who is willing to act as "hostess"[2] for groups of eight to ten or more students in her own dormitory room. In exchange, the hostess receives a Florida vacation. Although this vacation is repeatedly described as "free" in the "booking script" typically followed by AFS representatives during these telephone conversations, it is subject to the same restrictions and potential surcharges as the aforementioned "free" vacation awarded at the drawing.

If the student agrees to act as hostess, she is sent a "hostess kit" including fifteen invitations, which she is expected to distribute to her friends and acquaintances. At an agreed-upon time, the AFS representative arrives at her hostess' dormitory and presents her group demonstration. If there are fewer than ten students present initially, the hostess will (again following a script) typically inform them that the same "free" vacation is available as a "door prize", but only if ten or more students are in attendance, and will exhort them to gather additional attendees.

AFS uses its demonstrations to sell—generally on credit—sets of china, cookware, and/or tableware, ranging in price from $650 to $900, exclusive of interest. The demonstrations commonly conclude with what AFS calls "the contract section", at which purchase contracts for AFS products are distributed and signed, and a "firm up" section, following the representative's collection of deposits on the merchandise.

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[2]AFS's primary market is female.

Continuously since 1966, a regulation of the SUNY Board of Trustees has governed the conduct of commercial enterprises on all SUNY campuses. The regulation provides that:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry-cleaning, banking, barber and beauty services, and cultural events."

This regulation forbids not only AFS demonstrations in dormitory rooms, but also all activities whose purpose is the conduct of business for profit by either a student or a private invitee.

SUNY had found such a regulation necessary to preserve the educational atmosphere on SUNY campuses and promote the University's educational mission. Various SUNY officials testified that off-campus commercial vendors, recognizing in SUNY campuses an enormous stationary market of consumers, continuously sought to do business on campus. SUNY-Albany had at one point permitted a limited number of commercial vendors on campus as a fund-raising device for students and student organizations. As a result, the President of SUNY-Albany testified, the campus was overrun with vendors: he found it "difficult to walk into the campus center * * * because it was difficult literally to get through all the people selling things". When SUNY-Albany attempted to confine commercial activities on campus to "student operations" by student organizations under a permit system, it found that students were making money by "brokering" such permits to nonstudent vendors.

As shown in the record below, SUNY also considered the regulation necessary to preserve campus safety and security. SUNY campuses do not have mandatory "central checkpoint" systems for monitoring traffic on campus and in dormitories. By opening a campus to commercial enterprises, the flow of nonuniversity traffic on campus would increase, requiring stricter monitoring and control. Permitting access even to commercial invitees would, as one SUNY official explained, require a "central checkpoint" sign-in system in order to make certain a stranger is in fact a commercial invitee. Such a system would require increasing and reassigning residence hall staff on SUNY campuses, at an estimated cost to students of $250,000 per year for a single medium-sized SUNY campus.

In October 1982, an AFS representative in the process of consummating sales after a dormitory-room demonstration of AFS products at SUNY-Cortland was asked to leave by campus authorities acting pursuant to the regulation. When she refused, she was arrested. Subsequently, Todd Fox, a SUNY-Cortland student, sought and was denied permission to host an AFS demonstration. AFS, Fox, and other SUNY students who professed a desire to host or attend an AFS presentation in a dormitory room then filed suit pursuant to 42 USC § 1983, claiming that the SUNY regulation deprived them of their First Amendment right to freedom of speech and seeking declaratory and injunctive relief. The federal district court had jurisdiction of the action by virtue of its original jurisdiction over civil actions arising under the Constitution or laws of the United States, 28 USC § 1331, and by virtue of its original jurisdiction over civil rights actions. 28 USC § 1343.

The United States District Court for the Northern District of New York (McCurn, J.) upheld the SUNY regulation and dismissed the complaint. The court viewed the case in terms of a line of cases of this Court involving government efforts to preserve public property for its intended purposes in the face of an assertedly incompatible use. The District Court stated that SUNY dormitories are not "traditional public forums" —"places which by long tradition * * * have been devoted to assembly and debate" (24b). Nor are they "nonpublic forums", which are public areas "not by tradition or designation a forum for public communication" (22b). Rather, the court viewed them as "limited" public forums, opened by the state for the use of students participating in social, cultural, and educational—but not commercial—activities (27b-28b). Because the court did not view dormitories as public forums for the purpose of commercial activities, SUNY's regulation with respect to such activities need only be "viewpoint-neutral and reasonable in relation to the forum's purpose" (29b).

Because the regulation applied equally to all commercial operations, its viewpoint-neutrality was not seriously contested by the parties (29b). SUNY presented evidence that the regulation promoted numerous important goals: *inter alia,* to preserve the educational environment in the dormitories, to assure student safety at reasonable cost, and to prevent commercial exploitation of students (31b). The court held that given these purposes, SUNY's "position on commercial activities" embodied in its regulation was "reasonable" and therefore valid, especially in light of "the broad power of the states to formulate and implement educational policy" (32b).

The student plaintiffs, not joined by AFS, appealed to the Second Circuit, asserting a First Amendment right to receive information from AFS and other commercial invitees in their dormitory rooms. The Second Circuit reversed the judgment of the District Court and remanded the cause for further proceedings.

The court rejected the District Court's public forum analysis of the case. Such an approach was inapplicable, the court said, because with AFS no longer a party, the case involved not "the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights" (12a-13a).[3]

The court below then relied on the test for government regulation of commercial speech set forth by this Court in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York,* 447 US 557 (1980). As the Second Circuit noted, for a government restriction on commercial speech to be valid, *Central Hudson* requires that (1) the speech in question concern lawful activity and not be misleading; (2) the asserted government interest(s) vindicated by the regulation be substantial; (3) the regulation directly advances the asserted interest(s); and (4) the regu-

[3]Judge Mahoney, dissenting, disagreed with this reasoning. He did "not regard the issue as substantially transformed simply because [AFS] has adopted an *amicus* posture on this appeal" (20a). He stated that the issue remained what it had been below: "[A] corporation's right to hawk housewares in a college dormitory" (20a), quoting *American Future Systems, Inc. v. Pennsylvania State University,* 752 F2d 854, 867 (3d Cir 1984) (Adams, J., concurring), *cert. denied,* 473 US 911 (1985). In Judge Mahoney's opinion, "[t]he essential nature of the commercial transaction and resulting free speech issue remains before [the court], although admittedly now to be viewed from the vantage of the student hawkees." (20a)

lation be no more extensive than necessary to serve the interest(s). 447 U.S. at 566 (14a).

The first prong of the test was not at issue (14a). The Second Circuit found that SUNY's interests were substantial (14a-15a). It noted, however, that it was unclear whether the regulation "directly advances" SUNY's interests, for the district court, relying on public-forum analysis, "considered only whether the Regulation was reasonably related to the asserted governmental interests, not whether it directly advanced them" (15a).

The court also found that the fourth prong of *Central Hudson* required a remand. Expressly and flatly rejecting the conclusion of the Third Circuit in a very similar case also involving AFS, it held that the "no more extensive than necessary" language in *Central Hudson* requires that a government regulation of commercial speech be the "least restrictive means" available (15a-16a). Because the District Court had based its holding only on the reasonableness of the regulation, and indeed suggested that "a less restrictive measure might better balance the respective interests of the parties", the Second Circuit remanded the case for "appropriate findings" "under [its] analysis" (16a).

The Second Circuit did not address SUNY's assertion that its regulation was a valid time, place and manner restriction.

Judge Mahoney dissented. He found that the SUNY regulation "directly advances" SUNY's substantial interests, thus satisfying the third prong of *Central Hudson* (19a). He also declined to read the fourth prong of *Central Hudson* as a least restrictive means test (19a-20a). He further indicated that the case was correctly decided by the District Court in terms of public forum analysis (18a).

Reasons for Granting the Writ

I.

The opinion below creates a clear conflict between circuit courts as to the interpretation of the *Central Hudson* test for restrictions on commercial speech.

The decision below is in express conflict with the Third Circuit decision in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F2d 854 (3d Cir 1984), *cert denied*, 473 US 911 (1985) ("Penn State"), interpreting the fourth criterion identified in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 US 557 (1980), as relevant to determining whether a limitation on commercial speech is valid. Resolution of this conflict is vital for proper application of the *Central Hudson* test. In many instances, interpretation of the criterion at issue will determine the outcome of a case. This case is also important to the State University because the decision below significantly affects the ability of public universities to address security and educational issues posed by the unregulated entry of commercial vendors to their facilities.

In *Central Hudson*, this Court indicated that a valid government restriction on commercial speech not only must directly advance a substantial government interest, but also must be "no more extensive than is necessary to serve that interest". 477 US at 566. In other words, the restriction must be "narrowly drawn". 477 US at 565. The court below unwarrantedly interpreted this "narrowly drawn" criterion as a requirement that the restriction be the least restrictive means available. In doing so, it created a direct conflict with the Third Circuit. Only this Court can resolve the conflict.

In *American Future Systems, Inc. v. Pennsylvania State University,* 752 F2d 854 (3d Cir 1984), *cert denied,* 473 US 911 (1985) ("Penn State"), the Third Circuit interpreted facts virtually identical to the facts here in light of the same *Central Hudson* test to reach a contrary conclusion. In *Penn State,* as in this case, state university students asserted a First Amendment right to host and attend AFS presentations in dormitory rooms. The Third Circuit expressly considered and rejected the proposition that *Central Hudson* establishes a "least restrictive means" requirement. That court noted the similarity between the "narrowly drawn"/"no more extensive than necessary" language of *Central Hudson,* and the requirement, set forth in this Court's cases dealing with restrictions on the time, place and manner of speech, that such a restriction be "narrowly tailored to serve a legitimate government interest". *Penn State,* 752 F2d at 865-866, *citing Clark v. Community for Creative Non-Violence,* 468 US 288, 297 (1984); *see infra* Point III. Because this Court has stated that the "narrowly-tailored" requirement in time, place, or manner regulations is not a least-restrictive-means test, the Third Circuit concluded that the *Central Hudson* "narrowly drawn"/"no more extensive than necessary" requirement was to be interpreted the same way. 752 F2d at 866, quoting *Clark,* 468 US at 297 (1984) (time, place and manner regulation was "narrowly tailored" even though there were "less speech-restrictive alternatives that could have satisfied the government interest in question") and *Regan v. Time, Inc.,* 468 US 642, 657 (1984) ("The less-restrictive alternative analysis * * * has never been a part of the inquiry into the validity of a time, place, and manner regulation.")

The Second Circuit, on the other hand, flatly and explicitly rejected the Third Circuit's conclusion in holding that *Central Hudson* imposed a least-restrictive-means

test. It also found that this Court "implicitly endorsed" such a test in *Posadas de Puerto Rico Assoc. v. Tourism Co.,* ____US____, 106 S Ct 2968 (1986), by virtue of its "deference to the legislature's assessment of the least restrictive measure"[4] (16a).

The decisive importance of the interpretation of the fourth prong of *Central Hudson* is obvious simply from examining the two cases involving AFS and offering competing interpretations. In *Penn State,* the Third Circuit upheld the restriction on commercial speech "although we might be able to imagine alternative regulations that accomplish Penn State's objectives while interfering less with the students' and AFS's rights to communicate". 752 F2d at 866. There was, said the court, "a whole realm of permissible means of accomplishing the university's objectives", and its function was "limited to determining whether the school has chosen an acceptable—not the least restrictive—alternative". *Id.* The court below, conversely, made clear that the District Court's finding that "a less restrictive measure might better balance the respective interests of the parties" (32b) would prompt reversal under its interpretation of *Central Hudson.*

The importance of the interpretation of the fourth prong of *Central Hudson* for all cases involving commercial speech would be clear even without such starkly contrasting Court of Appeals decisions. A requirement that a government restriction on commercial speech be the "least restrictive alternative" means, as a practical mat-

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[4]It is unclear what the Second Circuit meant by this, for the term (or even the concept) "less restrictive" appears in *Posadas* only in a parenthetical quotation of a Fifth Circuit decision. See 106 S Ct at 2978. "Least restrictive" appears nowhere. As indicated *infra, Posadas* held only that this Court would not second-guess the legislature's conclusion that the less-restrictive measure proposed by plaintiffs was not "as effective" as the statute being scrutinized.

ter, that few such restrictions will survive (or would have survived) scrutiny, for."[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois Election Board v. Socialist Workers Party,* 440 US 173, 188-189 (1979) (Blackmun, J., concurring) (equal protection case). Conversely, a requirement that a less restrictive alternative be used only if the government interest can thereby "be served as well" incorporates a greater recognition of the legitimate governmental interests in the control of commercial speech and enhanced awareness of what this Court views as the focus of the *Central Hudson* test: "the 'fit' between the [government's] ends and the means chosen to accomplish those ends". *Posadas,* 106 S Ct at 2977.

We submit that, contrary to the view below, this Court does not regard *Central Hudson* as establishing a least restrictive means test. Although commercial speech is protected by the First Amendment, this Court has held that the Constitution affords less protection to commercial speech than to other constitutionally-guaranteed forms of expression. *See, e.g., Bolger v. Youngs Drug Products Corp.,* 463 US 60, 64-65 (1983); *Central Hudson,* 447 US at 563. Rather than equating commercial and noncommercial speech, this Court has "afforded commercial speech a limited measure of protection, commensurate wih its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression". *Ohralik v. Ohio State Bar Assn.,* 436 US 447, 456 (1978).

Reading into *Central Hudson* an absolute least-restrictive-means test creates an improper parity between commercial and noncommercial speech. As this Court has often noted, a government restriction on political speech, protection of which is of central importance to the First Amendment, *Boos v. Barry,* ____US____, 108 S Ct 1157, 1162 (1988), receives the "most exacting scrutiny", *id.* at 1164. It must be the least restrictive means of serving a compelling state interest. *Nixon v. Administrator of General Services,* 433 US 425, 467 (1977); *Shelton v. Tucker,* 364 US 479, 488 (1960). If the Second Circuit's holding is permitted to stand, commercial speech, despite its "subordinate" position, receives virtually the same amount of protection, subject only to the distinction (if any) between "substantial" and "compelling" government interests. This cannot be so.

That it in fact is not so is suggested by *Central Hudson* itself. In *Central Hudson,* the Public Service Commission of New York banned "promotional advertising" by utility companies, which it defined as "advertising intended to stimulate the purchase of utility services". 447 US at 559. The chief state interest vindicated by such a ban was that in energy conservation. This Court accepted the State's argument that its significant interest in conserving energy was directly advanced by a ban on advertising designed to increase the demand for electricity. 447 US at 569. The regulation nonetheless did not survive scrutiny under the fourth prong of the test. This Court noted simply that the State had failed to show that its interests could not be served fully as well by a regulation that permitted speech "promoting electrical services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources". 447 US at 570. In other words, the State's regulation was invalid because it could have been less restrictive *while still wholly vindicating the significant interest at stake.* Indeed, the regulation in *Central*

Hudson, by prohibiting speech that might ultimately aid in conserving energy use, ran contrary to the State's expressed interest. This is hardly the unadulterated least-restrictive-means test urged by respondents and adopted by the court below.

The key to the fourth prong of *Central Hudson* is thus whether there is a restriction more "narrowly drawn" than that actually imposed which also fully serves the state interest at stake. This is demonstrated by this Court's most recent commercial speech decision. In *Posadas,* the Puerto Rico legislature prohibited local casinos from advertising gambling facilities to residents of Puerto Rico, while permitting them to advertise to tourists elsewhere. The government interest at stake, which this Court deemed substantial, was "the reduction of demand for casino gambling by the residents of Puerto Rico". 106 S Ct at 2977. The plaintiff's suggested that the fourth prong of *Central Hudson* was violated and should have been met, not by suppressing commercial speech that encourages gambling, but by promulgating additional speech designed to discourage it. This Court noted simply that it is for the Legislature to decide whether such "counterspeech" "would be as effective in reducing the demand for casino gambling as a restriction on advertising". 106 S Ct at 2978.

If *Central Hudson* truly imposed a least restrictive means test, *Posadas* could not have been decided as it was. The "counterspeech" proposed by plaintiffs was obviously a less restrictive alternative than the complete ban actually enacted. Yet this Court deferred to the legislative conclusion that its purpose could not "be served as well" by a less restrictive alternative.

The *Central Hudson* test clearly is more akin to the standard of review this Court has developed for time,

place and manner restrictions. In *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 US 789 (1984), a city ordinance prohibited the posting of signs on public property, including signs posted by plaintiffs containing political speech promoting a certain candidacy for office. The government interest involved was the elimination of "visual clutter" and the promotion of esthetic interests. Although "plausible public policy arguments" supported an ordinance with "a less severe effect on expressive activity such as" plaintiffs', 466 US at 815-816, nonetheless this time, place and manner regulation was valid because it "respond[ed] precisely to the substantive problem which legitimately concerns the City", and "curtailed no more speech than is necessary to accomplish its purpose". 466 US at 810.

This language is indistinguishable from this Court's discussion of the fourth prong of *Central Hudson,* which requires that a regulation be "no more extensive than necessary to serve" a "substantial" government interest. *Central Hudson.* 447 US at 566. As noted *supra,* this Court has made clear that a valid time, place and manner regulation need not be the "least restrictive means" available to government. See *United States v. Albertini,* 472 US 675, 689 (1985) (regulation not invalid "simply because there is some imaginable alternative that might be less burdensome as speech"); *Clark, supra,* 468 US at 299 (regulation valid although there were "less speech-restrictive alternatives that could have satisfied the government interest in question"); *Regan, supra,* 468 US at 657 (plurality opinion) ("less-restrictive-alternative analysis * * * has never been a part of the inquiry into the validity of a time, place and manner regulation"). Thus, the indistinguishably-worded fourth prong of *Central Hudson* is not a least restrictive means test, either.

The Second Circuit's opinion creates a clear conflict between the circuits as to the interpretation of a critical portion of an important First Amendment test. In doing so, moreover, the court below erred, neglecting prior decisions of this Court and according unnecessary protection to commercial speech.

II.

This case poses the important question heretofore undecided by this Court, of whether public forum analysis applies to determine the use to which public property may be put by plaintiffs who have access to and privacy interests in such property.

The court below also erred in refusing to treat state university dormitories as limited public forums whose use could be restricted by SUNY on that basis. This is an additional important issue not finally resolved by this Court. In *Perry Education Association v. Perry Local Educators' Association,* 460 US 37, 46 (1983), this Court appeared to indicate that all "public property" was either a public forum or a nonpublic forum, with the use to which such property may be put determined accordingly. The court below nonetheless declined to treat state university dormitories in terms of forum analysis, finding such analysis "inapposite" because the case did not "involv[e] the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights" (12-13a). The applicability of the public forum doctrine in the state university context has never been discussed fully by this Court, is an important question and was incorrectly decided below.

According to this Court, all government property may be divided into three classes. There are "traditional public forums", such as streets or parks, "places which by long tradition * * * have been devoted to assembly and debate". *Perry,* 460 US at 45. There are "designated" or "limited" public forums, "which the State has opened for use by the public as a place for expressive activity", *id.,* and which may offer full First Amendment protection only to certain types of speakers or topics. *Cornelius v. NAACP Legal Defense and Educational Funds, Inc.,* 473 US 788, 802 (1985). Finally, there are "nonpublic forums", consisting of "[p]ublic property which is not by tradition or designation a forum for public communication". *Perry,* 460 US at 46.

It is not seriously disputed by petitioners that, if state university dormitory rooms are susceptible of forum analysis, they are either nonpublic forums or (as the district court below found) limited public forums whose "designated" purposes do not encompass commercial activities. Nor is it in question that the SUNY restrictions on commercial speech would pass constitutional muster under the reasonableness test to be applied either to limited public forums open for noncommercial speech only, or to nonpublic forums. *See Cornelius,* 473 US at 806. The only controverted issue is whether such an approach is relevant under the circumstances.

Nothing this Court has said indicates that forum analysis applies to anything less than all public property. The court below reasoned that a forum approach applied only to parties excluded from, and seeking access to, government property. But this Court's decisions will not sustain such an interpretation. As it has noted, forum analysis is "a means of determining when the Government's interest in limiting the *use* of its property to its intended purpose outweighs the interest of those wishing to *use* the property

for other purposes". 473 US at 800 (emphasis supplied). Cf. *United States Postal Service v. Council of Greenburgh Civic Associations,* 453 US 114, 136 (Brennan, J., concurring in the judgment) ("For public forum analysis, '[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time' ") (quoting *Grayned v. City of Rockford,* 408 US 104, 116 1972). The touchstone is *use* rather than access.

Thus, in the leading *Cornelius* case, this Court treated as a nonpublic forum a charity fund-raising drive aimed at federal employees to which certain legal defense funds sought access. This Court evaluated the case in terms of the nature of the forum, not the identity of the parties seeking access. It upheld the exclusion of advocacy organizations from the drive in light of the government interests in "minimiz[ing] disruption to the federal workplace", "ensur[ing] the success of the fund-raising effort", and "avoid[ing] the appearance of political favoritism". 473 US at 813. This reasoning did not depend on the identity of the litigants. It apparently would have been fully applicable even if the plaintiffs had been federal employees asserting (like the SUNY students) a right to receive material from advocacy organizations. Such a case would still depend on an analysis of the government's interest in preserving the forum for its intended use. That use is equally at stake any time the prohibited speech occurs on public property, regardless of whether the right being asserted is that of an excluded speaker or an already-present listener.

In a case quite similar to the case at bar, the Fourth Circuit applied public forum analysis to restrict use of state university property to which the student asserting First Amendment rights had access. In *Chapman v. Thomas,* 743 F2d 1056 (4th Cir 1984), *cert denied,* 471 US

1004 (1985), the Court of Appeals concluded that the residential areas of dormitories were nonpublic forums for a student engaging in door-to-door solicitation promoting attendance at discussions sponsored by his religious sect. The student had undisputed access to the dormitory hallways in which his speech occurred. Nonetheless, public forum analysis was applicable. It was the university's right to preserve dormitories for certain *uses* that forum analysis vindicated.

At the very least, the question of whether public forum doctrine limits use of, as well access to, public property is an important question that this Court has expressly left open. In *Board of Airport Commissioners v. Jews for Jesus, Inc.,* ____ US ____, 107 S Ct 2568, 2571 (1987), one question this Court evidently anticipated resolving was whether public forum analysis "is applicable when access to a nonpublic forum [i.e., a pedestrian walkway in an airport terminal] is not restricted". Because the regulation at issue in that case was invalid for overbreadth, this Court did not reach public forum analysis. The access/use question therefore remains, with ramifications reaching far beyond the context of the present case to include much other government property. The case at bar offers this Court an opportunity to resolve and clarify this important question and to correct the error of the Second Circuit.

III.

The court below erred in failing to treat SUNY's restriction on in-person commercial solicitation as a time, place and manner regulation.

Regardless of the position of SUNY dormitories on the public forum scale, SUNY may impose reasonable time,

place and manner restrictions on protected speech on its property. *See Perry,* 460 US at 45-46. Petitioners' brief below contended that SUNY's regulation was such a valid restriction. The contention was also discussed at oral argument. The Second Circuit, however, simply and erroneously failed to address the issue in its opinion.

A university may establish reasonable time, place and manner regulations governing student conduct. *Widmar v. Vincent,* 454 US 263, 268 n 5 (1981). The SUNY regulation is, moreover, such a time, place or manner regulation. Such a regulation restricts the *form,* rather than the *content* of speech. *Linmark Associates, Inc. v. Township of Willingboro,* 431 US 85, 93 (1977). SUNY does not forbid all commercial speech on campus. SUNY students may contact and be contacted by commercial concerns through the mass media, by telephone, and through the mail. Nor does it attempt to regulate students' off-campus commercial activities. They may meet with commercial enterprises off campus absolutely without restriction. SUNY regulates only the place (prohibiting dormitories and elsewhere on campus) and manner (face-to-face interaction with commercial invitees) of speech.

Nor was the Second Circuit's failure to consider the regulation as a time, place and manner restriction unimportant. The court below held as it did because it concluded that *Central Hudson* required a least-restrictive-means test for restrictions on commercial speech. It could not have so concluded with respect to time, place and manner regulations, for, as discussed, *supra,* Point I, this Court does not impose such a requirement. *See Albertini, supra,* 472 US at 689; *Clark, supra,* 468 US at 293; *Regan, supra,* 468 US at 657. A time, place or manner regulation need not be the least restrictive means of achieving the government interest in question, but need only "pro-

mot[e] a substantial government interest that would be achieved less effectively absent the regulation". *Albertini,* 472 US at 689.

Had the court below considered the SUNY regulation as a time, place and manner restriction, it would have had to uphold SUNY's action. A valid regulation must be content-neutral, narrowly tailored to serve a legitimate government interest, and leave open ample alternative channels for communication of information. *Clark,* 468 US at 293. The content-neutrality of the regulation, which applies across the board to all commercial invitees, is not in question. Moreover, as indicated above, the regulation permits students and commercial enterprises to come together in a variety of ways both on and off campus. Thus, it leaves open ample alternative channels. Finally, the regulation is "narrowly-tailored", in that it "respond[s] precisely to the substantive problems which legitimately concern" SUNY. 468 U.S. at 297; *Taxpayers for Vincent, supra,* 466 US at 810. SUNY has concededly legitimate interests in promoting its educational mission and preserving campus security and safety at minimal cost. There is abundant evidence in the record of SUNY's experience that even a system confining commercial activites to students' invitees can lead to a vast and disruptive commercial presence on campus. Likewise, the record shows that adopting respondents' suggestion of a "central checkpoint" system in each dormitory to investigate the *bona fides* of asserted commercial invitees would increase the hazardous presence of outsiders on campus, exacerbate overcrowding, and require reinforcement and reassignment of administrative staff at substantial cost. The regulation at issue, restricting only one type of commercial speech in a particular place, "responds precisely" to such problems.

Thus, the Second Circuit's refusal to uphold SUNY's regulation as a time, place and manner restriction was an error. Certainly, its total silence on the subject requires correction by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: Albany, New York
June 9, 1988

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 117—August Term, 1987

(Argued October 23, 1987 Decided March 11, 1988)

Docket No. 87-7296

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, and AMERICAN FUTURE SYSTEMS, INC.,

Plaintiffs,

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, and JACLYN BERNSTEIN,

Appellants,

—v.—

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK and CLIFTON R. WHARTON, JR., Individually and as Chancellor of the Board of Trustees and the State University of New York College at Cortland, and JAMES M. CLARK, Individually and as President of the College at Cortland, and the State University of New York at Binghamton, and CLIFFORD D. CLARK, Individually and as President of the State University of

New York at Binghamton, and the State University of New York at Albany, and VINCENT O'LEARY, Individually and as President of the State University of New York at Albany, and the State University of New York College of Arts and Sciences at Potsdam, and HUMPHREY TOMKIN, Individually and as President of the College of Arts and Sciences at Potsdam,

Appellees.

Before:

OAKES, CARDAMONE, and MAHONEY,
Circuit Judges.

Housewares company, company employee, and student challenged university regulation barring product demonstrations in student dormitories. United States District Court for the Northern District of New York, Neal P. McCurn, *Judge*, dismissed the complaint. Students appealed. *Held*, that (1) students have right to receive information in dormitory rooms; (2) district court erroneously applied public forum analysis; and (3) commercial speech tests are appropriate.

Reversed and remanded. Judge Mahoney dissents.

HENRY T. REATH (Wayne A. Mack, Jr., Duane, Morris & Heckscher, Philadelphia, PA; Ronald H. Sinzheimer, Albany, NY, of counsel), *for Appellants.*

DANIEL SMIRLOCK, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York, Peter Schiff, Deputy Solicitor General; Nancy A. Spiegel, Assistant Attorney General, Albany, NY, of counsel), *for Appellees.*

LANNY E. WALTER, Walter, Thayer & Long, Albany, NY, *for Amicus Curiae Student Association of the State University of New York, Inc.*

LEWIS B. OLIVER, JR., Oliver & Oliver, Albany, NY, *for Amici Curiae Student Association of the University at Albany, University at Albany's Tenant Association, Cortland College Student Association.*

MICHAEL GRIFFINGER, Crummy, Deldeo, Dolan, Griffinger & Vecchione, Newark, NJ, *for Amicus Curiae American Future Systems, Inc.*

OAKES, *Circuit Judge*:

This case commenced when a corporation selling housewares to college students challenged a university regulation barring its access to student dormitory rooms. Initially only one student who wished to host a housewares demonstration joined the suit. He argued that the university regulation impaired his constitutional right to receive information in his dormitory room. The United States District Court for the Northern District of New York, Neal P. McCurn, Judge, granted a preliminary injunction

utilizing commercial free speech analysis. *American Future Sys., Inc. v. State Univ.*, 565 F. Supp. 754 (N.D.N.Y. 1986). Additional students then joined the suit. After a non-jury trial, the district court turned away from the students' First Amendment rights and focused on the housewares company's efforts to enter the university. *Fox v. Board of Trustees*, 649 F. Supp. 1393, 1398-1402 (N.D.N.Y. 1986). On appeal, the focus of the case shifted. The housewares company dropped out as a party and is now merely an amicus. Numerous students and student organizations joined as amici curiae. The university, however, is still fighting the case as it began, and we note that the lawyers representing the students originally represented the housewares company. Yet, the case no longer involves an effort by outsiders to gain access to university property; rather it concerns only the constitutional rights of students in their dormitories. Accordingly, we reverse and remand for further proceedings in light of this opinion.

BACKGROUND

Appellants are students at various campuses of the State University of New York (SUNY), in particular, at Cortland, Albany, and Binghamton. The appellees are the Board of Trustees of SUNY, the chancellor of SUNY, SUNY colleges at Cortland, Albany, Binghamton, and Potsdam, and their respective presidents.

SUNY requires all freshmen, sophomores, and new transfer students to live in college-operated housing. Only students over twenty-one years of age, married students, students with prior military service, and students living at home with parents are exempt. All students living in SUNY housing sign a "license" covering room and board.

They agree to pay a specific amount for the academic year (subject to change by the SUNY trustees) in return for room and board "in the residence halls operated by the College subject to the rules and regulations of the College with respect to its students." The rules and regulations are described in the license and in university and college publications. One such publication, known as *RALPH*, is furnished by the residence life staff to all Cortland students. It sets forth the students' rights and responsibilities. *RALPH* is replete with assurances that the university will respect students' right to privacy in their dormitory room.

> As a member of the residence hall community and as a tenant of the College, you have a right to privacy in your own room. You should in no way be subject to arbitrary entry or searches by College officials or by anyone else. Additionally, you do not have the right at any time to enter another student's room without his or her specific permissions [*sic*].
>
> The College cannot, and will not, authorize any person to enter your room without your specific permission. The City Police Department, Campus Public Safety, and other law enforcement agencies are subject to the legal processes which govern entry into any dwelling.

RALPH informs students that law enforcement officials seeking entry to a student's room must have a search warrant which the student has a right to see. No member of the college or residence hall staff can enter a student's room without at least twenty-four hours' advance notice, except in "emergency situations when there is a reasonable fear of imminent danger to life, safety, health, or property."

Most of the campus living situations have unlimited visitation hours, although in a few dormitories visits may occur only from ~~6:00 a~~.m. to midnight, Sunday to Thursday, and from 6:00 a.m. to 2:00 a.m. on Friday and Saturday. Any visitor who stays past midnight must register with residence hall staff.

In 1966 the SUNY Board of Trustees adopted Resolution 66-156 which, as amended by Resolution 73-26 in 1973 and by Resolution 79-100 in 1979, reads as follows:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

The parties stipulated that the Resolution (hereinafter "the Regulation") prevents SUNY students from inviting into their dormitory rooms commercial enterprises or persons who furnish information, provide a product, or provide a service where a fee is charged or a profit involved. A statement of SUNY's policy prohibiting "selling and soliciting merchandise and services in residence halls" appears in *RALPH* and other university publications.

The commercial enterprise which precipitated this case and at least one other, *see American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985), is American Future Systems, Inc. ("AFS"). AFS sells cookware, china, crystal, and silverware to college students through group demonstrations arranged by students. It obtains students' names from student directories and referrals, or through a procedure called "chatterbooking." In chatterbooking, an AFS

representative invites students to register for a vacation drawing. AFS then promises a free Florida vacation to students who invite friends to an AFS demonstration in their dormitory rooms.

The instant controversy arose when SUNY/Cortland officials told Kathy Rapp, the AFS regional director, to leave a dormitory room where she was giving an AFS presentation. When she refused, she was arrested and ultimately charged with loitering, soliciting without a permit, and trespass. AFS, Rapp, and Todd Fox, a SUNY/Cortland student who had been denied permission to host an AFS presentation in his dormitory room, brought suit. In his affidavit, Fox referred to the prohibition against the AFS presentation as "an unjustified intrusion on my rights, as a student, to privacy and to speak and associate freely with others of my choice in my dormitory room." He asserted that "the presentation, if held at a reasonable hour, would not have intruded in any way on the privacy of other dormitory students in my residence hall." The affidavit stated that Fox "wanted the opportunity to see the [AFS] products and to hear and participate in the presentation and discussion about the products, cooking, nutrition, budgetary planning and other matters," and to observe the art of salesmanship. Fox indicated that "[a] variety of noisy and disruptive activities go on in the dormitories on a regular basis," including "blaring stereos, electric guitar playing, raucous behavior, loud music, parties, drinking of alcoholic beverages, etc., [which] present a much greater potential for disruption" than a sales presentation. Fox reported that SUNY/Cortland students use their dormitory rooms for private day-to-day living activities but generally study elsewhere, at the university library, the student union building, classrooms, or study rooms.

The district court preliminarily enjoined the university from prohibiting demonstrations in the dormitory rooms of a consenting SUNY/Cortland student. *American Future Sys.*, 565 F. Supp. 754. It did not, however, "restrain defendants from promulgating and enforcing reasonable restrictions governing the time, place, and manner of such demonstrations." *Id.* at 771. Judge McCurn also refused to enjoin the ban on actual sales of AFS products.

In response, SUNY/Cortland promulgated regulations forbidding the consummation of all sales on campus. In addition, they restricted AFS presentations to certain hours, confined the presentations to student rooms where all roommates had given written permission, and limited the number of participants to ten. The regulations also required the resident hosting the AFS presentation to complete satisfactorily a registration form and to be present throughout the demonstration.

At trial,[1] SUNY officials testified that permitting commercial presentations on university property would dramatically increase the number of people on campus. They suggested this would disrupt the academic environment and endanger students' safety. Establishing a checkpoint system to monitor the additional traffic on campus, they contended, would require additional personnel at a substantial cost to the university. SUNY/Albany officials testified that when they had permitted commercial enter-

1 The plaintiffs added defendants and amended the pleadings several times before the case was tried. The presidents of SUNY/Albany, SUNY/Binghamton, and SUNY/Potsdam were added as defendants. On April 15, 1984, the court extended the preliminary injunction to these additional defendants. The pleadings were amended to challenge both the SUNY Resolution 66-156 and the subsequently issued Cortland regulations. Several student plaintiffs were dropped or added consistent with their matriculation at the various state colleges. In addition, Kathy Rapp was dropped as a plaintiff.

prises to operate in the college's common areas, sales personnel had flooded the campus.

The district court characterized the speech in question as commercial speech. *Fox*, 649 F. Supp. at 1398. However, the court concluded that because the speech took place on government property, the public forum approach was appropriate. *Id.* at 1398-99 (citing *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986); *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985)). Since the university permitted social, cultural, and educational activities in the dormitories while prohibiting commercial activities, Judge McCurn concluded that SUNY dormitory rooms constituted limited public fora. *Id.* at 1400-01 (citing *Cornelius*, 473 U.S. at 802, and *Calash*, 788 F.2d at 83-84; distinguishing *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), and *Pennsylvania State*, 752 F.2d at 870-71 (Adams, J., concurring)). The district court also held that the restriction in the Regulation was viewpoint neutral because it applied equally to AFS, pizza vendors, doctors, lawyers, and all other nonstudents motivated by profits. *Id.* at 1401. Finally, the district court concluded that the Regulation was reasonable in relation to its purpose—that is, preserving the educational environment, assuring student safety, preventing commercial exploitation of students, avoiding the use of tax-supported facilities for private commercial gain, and preventing overcrowding in the dormitories. *Id.* at 1402. Having found the SUNY Regulation to be a reasonable, viewpoint-neutral restriction on commercial speech in a limited public forum, the district court dismissed the complaint. This appeal ensued.

DISCUSSION

We start with the proposition that students, particularly college students, "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " *Hazelwood School Dist. v. Kuhlmeier*, 56 U.S.L.W. 4079, 4081 (U.S. Jan. 13, 1988), *rev'g* 795 F.2d 1368 (8th Cir. 1986) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). *Accord Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Healy v. James*, 408 U.S. 169, 180 (1972). As *Healy* said,

> Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied "in light of the special characteristics of the . . . environment" in the particular case. And, where state-operated educational institutions are involved, this Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

408 U.S. at 180 (citations omitted).

Accordingly, the courts have extended Fourth Amendment protection to college students in respect to their dormitory rooms. *E.g.*, *Piazzola v. Watkins*, 442 F.2d 284, 289-90 (5th Cir. 1971); *Morale v. Grigel*, 422 F. Supp. 988,

997 (D. N.H. 1976); *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 272 A.2d 271 (1970). This has also been the law of New York, at least as expressed in *People v. Cohen*, 57 Misc.2d 366, 292 N.Y.S.2d 706 (Dist. Ct. 1968), *aff'd*, 61 Misc.2d 858, 306 N.Y.S.2d 788 (Sup. Ct. 1969). *RALPH*, the SUNY/Cortland student informational booklet, recognizes that students in dormitory rooms, like all tenants, enjoy the right of privacy and freedom from an unreasonable search or seizure. Similarly, we agree that students who are required to live on campus and in a dormitory room should not be deprived of any rights to free speech or expression that they would have were they living off campus, absent a showing by the university that its educational mission would be "materially disrupt[ed]." *Tinker*, 393 U.S. at 513.

One of the constitutional rights enjoyed by students, of course, must be the right to receive information. *See Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 106 S. Ct. 903, 907 (1986) (plurality opinion). As Paul Freund wrote twenty-seven years ago, "[t]he right to speak is the individualized legal reflection of the more generalized right to hear, which is basic to the process of political flux." P. Freund, *The Supreme Court of the United States* 81 (1961). The Supreme Court has recognized the right to receive information and ideas in a variety of contexts. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (nonprisoners' right to receive correspondence from prisoners); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (rights of mail recipients); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (rights of workers to hear labor organizers); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (rights of residents to receive handbills at their door). As Justice Powell wrote in his concurring opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976):

"[t]he primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message." The right to receive information and ideas as embodied in the First Amendment is reflected in privacy cases, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (plurality opinion), and lies at the very foundation of the so-called commercial free speech cases which have been an area of developing Supreme Court jurisprudence over the last fifteen years. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-75 (1983); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976). *Cf. Posadas de Puerto Rico Assoc. v. Tourism Co.*, 106 S. Ct. 2968, 2976 (1986); *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Carey v. Populations Servs. Int'l*, 431 U.S. 678, 700-01 (1977); *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

The right to receive information and ideas is particularly important for students. As Justice Brennan recognized, "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion). Justice Brennan was referring to junior high and high school students; surely the right to receive information is at least as critical to university students.

Since this case no longer involves the rights of third persons to gain access to state-owned property to give or re-

ceive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights, the public forum cases thought applicable by the district court are inapposite. *Cornelius*, 473 U.S. at 793 (legal defense and political advocacy organizations sought access to federal employees' charity drive); *Perry Educ. Ass'n*, 460 U.S. at 38-41 (teachers' union sought access to school mail facilities); *Calash*, 788 F.2d at 81 (concert promoter sought access to municipal stadium); *Glover*, 762 F.2d at 1198 (political party members sought access to college campus). Nor are we concerned with a student's right to free expression on the university campus other than in the dormitory room, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981), or a student's right to solicit door-to-door in university dormitories, *Chapman*, 743 F.2d 1056.[2]

In this case the university's Regulation limits the students' right to receive information and hear speech in their dormitory rooms. The constitutionality of that regulation depends upon the degree of protection extended to the speech involved. Here, as Judge McCurn correctly found, the communication the students wish to receive is commercial speech. *See Fox*, 649 F. Supp. at 1398; *American Future Sys.*, 565 F. Supp. at 761-63. AFS demonstrations propose a commercial transaction, the sale of AFS products. The communication, therefore, is commercial, *Central Hudson*, 447 U.S. at 562; *Virginia Pharmacy*, 425 U.S. at 762, notwithstanding the fact that it may contain some noncommercial elements. *See Bolger*, 463 U.S. at 67-68; *Pennsylvania State*, 752 F.2d at 860-62.

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2 Since this case concerns students' rights to free speech in their dormitory rooms and nowhere else on university campus, the public forum analysis of *Hazelwood* is inapplicable.

In commercial speech cases, the Supreme Court instructs us to apply a four-part analysis first set forth explicitly in *Central Hudson*, 447 U.S. at 561-66. We must first determine whether the expression is protected by the First Amendment, which requires that the commercial speech concern lawful activity and not be misleading. Second, we must ask whether the asserted governmental interest is substantial. Then, we must determine whether the Regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest. *Posadas*, 106 S. Ct. at 2976; *Central Hudson*, 447 U.S. at 566.

As to the first prong of the *Central Hudson* test, the district court found, when granting a preliminary injunction, that AFS demonstrations concerned lawful activity and were not misleading. 565 F. Supp. at 763-64; *see also Pennsylvania State*, 752 F.2d at 863. This finding was not challenged at the trial on the merits notwithstanding evidence that students agreed to host AFS demonstrations only after unsolicited mailings and telephone calls promised vacations and gifts.

The burden therefore shifts to the state not merely to assert that it has a substantial interest but to demonstrate that interest by real evidence. The governmental interests asserted by SUNY, we agree, are substantial: (1) prevention of crime, *Posadas*, 106 S. Ct. at 2977; *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1551 (7th Cir. 1986), *aff'd*, 107 S. Ct. 919 (1987); (2) protection against consumer exploitation, *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978); (3) preservation of residential tranquility, *Carey v. Brown*, 447 U.S. 455, 471 (1980); *cf. Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *but cf. Tinker*, 393 U.S. at 508 (undifferentiated

fear of disturbance does not overcome right to free expression); and (4) promotion of education. *Hazelwood*, 56 U.S.L.W. at 4081.

It is less clear, however, that the Regulation directly advances the State's interests; the Regulation cannot be sustained if it only provides "ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. Arguably, limiting the number of persons permitted entry to dormitories helps preserve quiet and reduce the possibilities of crime, and barring direct selling minimizes the opportunities for exploitation. *See Pennsylvania State*, 752 F.2d at 865 & n.30 (barring commercial solicitations promotes dormitories as study and residential areas). The fact that the Regulation is under-inclusive because it does not bar disruptions such as loud music or parties or commercial solicitation through the mail, television, or newsprint does not mean it does not "directly advance" the asserted governmental interests. *See Posadas*, 106 S. Ct. at 2977. Whether SUNY offered sufficient evidence to meet its burden is not evident as the district court considered only whether the Regulation was reasonably related to the asserted governmental interests, not whether it directly advanced them.

However, even if the Regulation directly advances substantial governmental interests, it must be no "more extensive than is necessary to further [the state's] interests." *Central Hudson*, 447 U.S. at 566. SUNY argues that *Central Hudson* does not require the "least restrictive means," citing *Pennsylvania State*, 752 F.2d at 865-66. In that case, the Third Circuit concluded that since the "narrowly tailored to serve a significant governmental interest" language in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), does not require

"least restrictive means," neither does *Central Hudson*'s "not more extensive than necessary" language. We disagree. *Central Hudson* makes clear that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. at 564. The *Posadas* Court's deference to the legislature's assessment of the least restrictive effective measure implicitly endorsed that test. 106 S. Ct. at 2978. Moreover, the Court observed that "rational basis" equal protection analysis was easier to satisfy than the *Central Hudson* test, thereby rejecting a reasonable relationship test for commercial speech. *Id.* at 2979 n.9. Here the district court's ultimate holding was based only on the reasonableness of the Regulation. 649 F. Supp. at 1402. Indeed, the district court found that "there is support in the record for the plaintiffs' position that a less restrictive measure might better balance the respective interests of the parties. . . ." *Id.*

The SUNY Regulation survived constitutional scrutiny below only because the First Amendment rights of students were ignored. In light of the district court's thorough familiarity with the case, we have little doubt but that on remand under the analysis this opinion imposes, the court will be able to make appropriate findings and draw a suitable order.

Judgment reversed; cause remanded. Costs to neither party.

MAHONEY, J., dissenting:

I respectfully dissent.

Other circuit courts have considered this issue, or cognate issues, and have concluded that university regulations of this nature do not offend the first amendment. Specifically, the Third Circuit concluded, in *American Future Systems, Inc. v. Pa. State Univ.*, 752 F.2d 854 (3d Cir. 1984), *cert. denied sub. nom. Johnson v. Pa. State Univ.*, 473 U.S. 911 (1985) ("American Future Systems"), that Pennsylvania State University could legitimately prohibit group sales demonstrations by American Future Systems, Inc., *amicus* here and a plaintiff below, in individual student rooms.[1] The majority opinion, in which the two other panel members who wrote separately concurred, see *id.*, 752 F.2d at 867, 872, premised this result on a commercial speech analysis. Circuit Judge Adams, concurring, opined that the result could be justified by a number of rationales, including commercial speech analysis, time, place and manner restrictions, special considerations pertinent to a university setting, and public forum analysis. *Id.*, 752 F.2d at 867-71 (Adams, J., concurring).

The Fourth Circuit considered the general question in *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985), and *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). *Glover* held that West Virginia State College could validly enforce on its campus a statewide policy prohibiting on-campus sales and fund raising activities by groups not sponsored by students or the college. The challenge there was posed by representatives of

1 A later enacted ban prohibited use of the common areas of dormitories for commercial demonstrations, as well, but the validity of the broader ban was not considered in that litigation. *See id.*, 752 F.2d at 860 n.21.

the Socialist Workers Party and the Young Socialist Alliance. *Chapman* concluded that North Carolina State University could constitutionally prohibit door-to-door solicitations in university dormitories, and apply that prohibition to a student who sought to promote attendance at Bible discussions on the university campus by such solicitations. The discussions were sponsored by the Church of Christ, a fundamentalist, evangelical church.

Against this backdrop, I would not invalidate on first amendment grounds the regulation which SUNY seeks to enforce here. If, as the district court deemed appropriate below, a "public forum" analysis is employed, the Supreme Court has explicitly held that a "decision to restrict access of a non-public forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, ____, 105 S.Ct. 3439, 3453 (1985) (emphasis in original). A "limited" public forum, which allows some, but less than indiscriminate, access to outsiders on terms which do not include the litigant seeking access, is subject to this analysis. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47-48 (1983).

I do not understand the majority to assert that the SUNY regulation at issue here does not meet this test of reasonableness. Rather, the majority employs the "commercial speech" analysis articulated in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), concluding that: (1) since the district court considered, under its "public forum" analysis, whether the SUNY regulation is reasonably related to the asserted governmental interests, rather than, as the *Central Hudson* test mandates, whether it "directly advance[s]" them, 447 U.S. at 564, the district court's affirmative conclusion on

this point is suspect; and, more dispositively, (2) *Central Hudson*, in specifying that "excessive restrictions cannot survive" if "the governmental interest could be served as well by a more limited restriction on commercial speech," *id.*, imposes a "least restrictive means" requirement. On the latter point, the majority rejects the contrary conclusion reached by the Third Circuit in *American Future Systems*, 752 F.2d at 865-66.

I do not find this analysis persuasive. First, I don't see a significant difference between the "reasonable relationship" and "directly advances" criteria as to promotion of the admittedly substantial government interests which SUNY asserts in support of its regulation, believe that the situation before us can be validly analyzed under either approach, *see generally American Future Systems*, 752 F.2d at 867-71 (Adams, J., concurring), and in any event would find either test satisfied on this record.

Secondly, I do not believe that *Central Hudson* should be read as imposing a "least restrictive alternative" requirement. That case did not, on its facts, address such a question, since the regulation at issue there imposed a *complete* ban on advertising to promote the use of electricity. *Central Hudson*, 447 U.S. at 558. Moreover, subsequent to the Third Circuit's ruling in *American Future Systems*, which I find persuasive in any event, the Supreme Court has squarely rejected the "least restrictive alternative" requirement in the cognate "public forum" area, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, ____, 105 S.Ct. 3439, 3453 (1985), and has emphasized in *Hazelwood School Dist. v. Kuhlmeier*, ____ U.S. ____, 108 S.Ct. 562 (1988), that "the education of the Nation's youth is primarily the responsibility of parents, teachers and state and local school officials, and not

of federal judges." *Id.*, 108 S.Ct. at 571 (citations omitted).[2] In light of these subsequent developments, and since *Central Hudson* did not, in my view, initiate a "least restrictive alternative" requirement, I would not impose such a requirement here.

I conclude, with Judge Adams of the Third Circuit, that:

> With all due respect, I do not believe that the First Amendment's protection of a free and robust marketplace of ideas requires that a university dormitory be turned into a marketplace for a private corporation's sale of kitchenware.

American Future Systems, 752 F.2d at 871 (Adams, J., concurring).[3]

I would therefore affirm, and accordingly dissent.

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2 It should be noted that *Hazelwood* dealt with a school newspaper produced in conjunction with the journalism class of a public high school, and expressly reserved the question "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Hazelwood*, 108 S.Ct. at 571 n.7. I would not read this reservation, however, as totally undercutting *Hazelwood's* applicability here.

3 More colorfully, Judge Adams posed the issue elsewhere in his concurrence as "involving a corporation's right to hawk housewares in a college dormitory . . ." *Id.* at 867. I do not regard the issue as substantially transformed simply because the corporation in question, a party below, has adopted an *amicus* posture on this appeal. The essential nature of the commercial transaction and resulting free speech issue remains before us, although admittedly now to be viewed from the vantage of the student-hawkees.

1393

FOX v. BD. OF TRUSTEES OF STATE UNIVERSITY OF N.Y.

Cite as 649 F.Supp. 1393 (N.D.N.Y. 1986)

Todd FOX, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan, Jaclyn Bertstein, and American Future Systems, Inc., Plaintiffs,

v.

The BOARD OF TRUSTEES OF the STATE UNIVERSITY OF NEW YORK and Clifton R. Wharton, Jr., Individually and as Chancellor of the Board of Trustees, and the State University of New York College at Cortland, and James M. Clark, Individually and as President of the College at Cortland, and the State University of New York at Binghamton, and Clifford D. Clark, Individually and as President of the State University of New York at Binghamton, and the State University of New York at Albany, and Vincent O'Leary, Individually and as President of the State University of New York at Albany, and the State University of

New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, Individually and as President of the College of Arts and Sciences at Potsdam, Defendants.

No. 82-CV-1363.

United States District Court, N.D. New York.

Dec. 12, 1986.

Corporation and students brought action seeking declarative and injunctive relief against various colleges of the State University of New York and various university officials based upon refusal of colleges and officials to permit corporation to conduct product demonstration in campus dormitory rooms, even when invited to do so by students. The District Court, McCurn, J., held that: (1) Eleventh Amendment immunity barred claims against various colleges, but not against officials; (2) speech involved in product demonstrations was commercial speech; (3) student dormitory rooms were limited public forums; and (4) total ban on commercial activity in dormitory rooms was viewpoint-neutral and reasonable in relation to SUNY's mission of education.

So ordered.

1. Federal Courts ⇐272

Eleventh Amendment immunity barred action for declarative and injunctive relief against various State University of New York colleges, but not against SUNY officials, in action based on refusal of colleges and their officials to permit corporation to demonstrate its products in campus dormitory rooms, even when invited to do so by students. U.S.C.A. Const.Amend. 11.

2. Constitutional Law ⇐90.2

Speech involved in product demonstrations in campus dormitory rooms was commercial, both with respect to corporation demonstrating products and to students listening to demonstration, even though speech may have contained some noncommercial elements. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.1(4), 90.2

Student dormitory rooms were limited public forums, for purposes of applying public forum doctrine to university's regulation of student-requested product demon-

strations by corporation agents in dormitory rooms; dormitory rooms were public forums for noncommercial activities and nonpublic forums for commercial activities. U.S.C.A. Const.Amend. 1.

4. Colleges and Universities ⇐6(5), 9.30(3)

Constitutional Law ⇐90.2

State university's total ban on commercial activity in dormitory rooms was viewpoint-neutral and reasonable in relation to university's purposes; therefore, First Amendment rights of corporation seeking to give product demonstrations at the request of students in students' dormitory rooms were not violated by university resolution prohibiting all commercial activity in dormitory rooms. U.S.C.A. Const.Amend. 1.

Ronald H. Sinzheimer, Albany, N.Y., Duane Morris & Heckscher, Philadelphia, Pa., for plaintiffs; Henry T. Reath, of counsel.

Robert Abrams, Atty. Gen. of the State of N.Y., Albany, N.Y., for defendants; Lawrence Doolittle, Asst. Atty. Gen., of counsel.

MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

American Future Systems, Inc. (AFS) and several students of the State University of New York (SUNY) have brought this action for declarative and injunctive relief against the Board of Trustees of the State University of New York, the Chancellor of the State University, and several individual constituent colleges of the State University and their respective presidents. The gravamen of the complaint is that the defendants have refused to permit AFS to conduct product demonstrations in campus dormitory rooms, even when invited to do so by the students. The plaintiffs assert that such action by the defendants unconstitutionally deprives AFS and the students of their first amendment free speech rights.

A non-jury trial on the merits was held by the court between September 24 and October 1, 1986. Following are the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

I. FINDINGS OF FACT

AFS is a corporation engaged in selling cookware, china, crystal, and silverware to college students through group demonstrations. Such group demonstrations are arranged by personal contact with students. Personal contact is initiated in several ways. An AFS representative may obtain names and telephone numbers of students from student directories, bulletin boards, referrals by other students, or through a procedure called "chatterbooking". In "chatterbooking," an AFS representative invites students in common areas of the campus to register for a vacation drawing. Students are required to list their names and telephone numbers on the drawing cards. This information is in-turn used for the booking procedure.

Once the student names and telephone numbers are obtained, the representative or one of twenty AFS "booking agents" will make a telephone call in an attempt to arrange a demonstration. The student is encouraged to permit AFS to conduct a demonstration in the student's own living quarters before his or her friends. To encourage the student's participation, AFS informs the student that by hosting a show

he or she can obtain a free vacation to Florida or another resort. AFS also informs the student of its policy of donating money to "Save the Children" for each attendee at the demonstration. If the student agrees, a group demonstration is arranged.

The instant controversy arose because SUNY enforced a policy that prohibits AFS demonstrations from occurring in students' dormitory rooms. That policy, SUNY Resolution 66–156, as amended, provides:

> No authorization will be given to private commercial enterprises to operate on State University campuses or facilities furnished by the University other than to provide for food, campus bookstore, laundry, dry-cleaning, barber and beauty services, and cultural events.[1]

The policy was enforced, with respect to AFS, when an AFS representative conducting a demonstration in a dormitory room at SUNY–Cortland on October 17, 1982 was told to leave by campus authorities. The following day, the AFS Regional Director,

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1. The defendants have stipulated that the policy prevents AFS demonstrations in dormitory rooms.

Kathy Rapp, entered the dormitory to give a demonstration. The dormitory director came into the room when Rapp was consummating sales, and told Rapp to leave the premises. Rapp replied that she had a constitutional right to stay. The campus police arrived and again told Rapp to leave, and she again refused. The officers then arrested Rapp on charges of loitering and soliciting without a permit. A charge of trespass was later added. Subsequently, another student, Todd Fox, agreed to host an AFS presentation in his dormitory room. He first requested permission from defendant Raymond Franco, Director of Residential Life at SUNY–Cortland. Franco responded by letter denying Fox permission to host the demonstration and stating that legal action, other than arrests, would be taken if any such demonstration were held.

In order to challenge the SUNY resolution and its enforcement at SUNY–Cortland, AFS, Kathy Rapp, and Todd Fox commenced this suit on December 2, 1982. In June of 1983, this court enjoined defendants from prohibiting AFS from demonstrating its products in the dormitory rooms of SUNY–Cortland students.

American Future Systems, Inc. v. State University of New York, 565 F.Supp. 754 (N.D.N.Y.1983). The court refused, however, to enjoin the defendants from prohibiting the actual sale of AFS products. *Id.* In addition, the court noted: "Nothing in this Order shall restrain defendants from promulgating and enforcing reasonable restrictions governing the time, place, and manner of such demonstrations." *Id.* at 771. In response, SUNY–Cortland promulgated the following regulations:

COMMERCIAL PRESENTATIONS BY REPRESENTATIVES OF AMERICAN FUTURE SYSTEMS, INC.

The following regulations are established in accordance with the June 3, 1983 preliminary injunction Order entered by the Honorable Neal P. McCurn, U.S. District Judge for the Northern District of New York pending final determination in the *American Future Systems, Inc., et al. v. State University of New York College at Cortland, et. al.* case.

Where a student residing in College housing elects to invite an American Future Systems, Inc. representative into his/her room to conduct, host or participate in a commercial presentation, such

presentation will be allowed only in accordance with the regulations outlined below. No commercial activity involving the consummation of sales will be allowed on the College premises. CONSUMMATION OF SALES SHALL INCLUDE ACTIVITY SUCH AS THE TRANSFER OF CASH, CHECKS OR MONEY ORDERS IN EXCHANGE FOR PRODUCTS; THE USE OF CREDIT CARDS FOR THE PURCHASE, LEASE OR RENTAL OF PRODUCTS, AND/OR ENTERING INTO AGREEMENTS (EITHER WRITTEN OR ORAL) FOR THE PURCHASE, LEASE OR RENTAL OF PRODUCTS.

If violations occur in relation to this sales prohibition and/or compliance with these regulations, the resident who issued the invitation and all other residents involved may be subject to appropriate disciplinary action. American Future System, Inc.'s representative(s) may be subject to ejectment and may also be excluded from further entry into College premises.

TIME

Commercial presentations given by invited American Future Systems, Inc. representatives will be limited to certain hours. During the year when residence

halls are open to students, such presentations are permitted between 2:00 and 9:00 P.M. except during exam periods, when they conflict with study hours established by individual residence hall governance committees.

PLACE

No commercial presentations by American Future Systems, Inc. representative(s) are allowed in common areas of the residence halls. Only presentations in student rooms-with written permission from all roommates/suitemates and in accordance with stated rules and regulations governing such presentations-will be permitted. The number of participants will be limited to ten (10).

MANNER

Commercial presentations by American Future Systems, Inc. representatives will be allowed if they are by resident invitation and if a registration form is satisfactorily completed. All information and signatures requested on the registration form must be provided and submitted to the Director of Residence Life or designee by 12:00 P.M. (Noon) of the working day *prior* to the presentation.

The resident who has invited the Ameri-

can Future Systems, Inc.'s representative into the residence hall to give a presentation is responsible for the conduct of his/her guest and must be present during the duration of the visit.

The pleadings have been amended several times throughout the prosecution of this action. The presidents of SUNY–Potsdam, SUNY–Albany and SUNY–Binghamton have been added as defendants. Consistently, the court's preliminary injunction of 1983 was extended to the additional defendants by this court's order of April 15, 1984.[2] The amended pleadings challenge both the initial SUNY Resolution 66–156, and the Cortland interim regulation described above. The plaintiffs claim that Resolution 66–156 violates the pure and commercial speech rights of the student plaintiffs,[3] as well as the commerical speech rights of AFS.[4] In addition, they claim that enforcement of the Cortland interim regulations has deprived both the

2. Unlike SUNY–Cortland, the additional defendants apparently have not promulgated time, place and manner restrictions.

3. See Amended Complaint, Counts I and II.

4. See Amended Complaint, Count III.

students and AFS of due process of law.[5] The plaintiffs have also changed. Kathy Rapp is no longer a named plaintiff, while several student plaintiffs have been dropped and others added, dependent upon their matriculation at the various state colleges.

II. CONCLUSIONS OF LAW

[1] Defendants assert that this court has no jurisdiction over the claims against the various SUNY Colleges: SUNY–Cortland, SUNY–Potsdam, SUNY–Albany, and SUNY–Binghamton. The court agrees that the eleventh amendment bars the action against the named colleges. While the eleventh amendment does not bar the federal claims for prospective injunctive relief against SUNY officials, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102–03, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (1984), claims against a state or one of its agencies are barred, in the absence of consent, regardless of the nature of the relief sought, *id.* at 100–01, 900 S.Ct. at 908. The court is aware of no consent by the State of New York to this suit or

5. See Amended Complaint, Counts IV and V. The "due process of law" claim is that the interim regulations do not constitute *reasonable* time, place and manner restrictions.

similar suits. Furthermore, it is clear that SUNY is considered to be the State for eleventh amendment purposes. *Williams v. State University of New York*, 635 F.Supp. 1243, 1249–50 (E.D.N.Y.1986); *Lachica v. Jaffe*, 578 F.Supp. 83, 84–85 (E.D. N.Y.1983).

Defendants also assert that claims of certain student plaintiffs are moot as these students no longer live in the dormitories. The court need not address this contention because at least some of the plaintiffs still reside in the dormitories. Consequently, a live "case or controversy" is presented to this court.

It is axiomatic that students are entitled to their constitutional right of free speech. They do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). It is also clear that the first amendment accords commercial enterprises a level of protection to ply their trade. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825–26, 48 L.Ed.2d 346 (1976). Equally beyond dispute is that the Constitution protects the citizens' right to listen as well as to speak. *Id.* at 756–57, 96 S.Ct. at 1822–23. Consequently, implicated here are the first amendment rights of AFS to ply its trade and of the students to receive information from AFS.

The Supreme Court has also "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct within the schools." *Tinker*, 393 U.S. at 507, 89 S.Ct. at 737. The facts of this case implicate SUNY's comprehensive authority to regulate conduct on SUNY campuses to carry out the educational mission of the University. The question before the court is whether SUNY has exercised its comprehensive authority, by promulgating and enforcing the regulations in question, in a manner which unconstitutionally infringes on the first amendment rights of AFS and the students.

A. *Applicable Standard*

The Supreme Court has utilized several tests in first amendment cases to resolve the conflict between the competing interests of the state and the citizenry. *See J.*

Nowak, R. Rotunda & J. Young, Constitutional Law, 864–73 (2d ed. 1983). The threshold question is which of these tests should this court apply here.

[2] In 1983, the court issued a preliminary injunction in this case partially in favor of the plaintiffs. *See AFS v. SUNY*, 565 F.Supp. 754. In so doing, the court determined that the applicable standard was the commercial speech standard announced by the Supreme Court in *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).[6] The court adopted the

6. The *Central Hudson* Court defined the test as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 567, 100 S.Ct. at 2352.

In applying the *Central Hudson* test to the facts available on the motion for a preliminary injunction, the court determined that the AFS

(Footnote continued on following page.)

commercial speech standard because it was completely unconvinced by the record before it that the speech in question was pure as opposed to commercial. After trial, the court remains unconvinced. While it may be true that some of the students may receive pure speech information from AFS demonstrations, it cannot be reasonably controverted that the bulk of such a demonstration concerns speech directed toward a commercial transaction, the sale of AFS products. Therefore, the speech in question is properly characterized as commercial speech. *Virginia State Board of Pharmacy*, 425 U.S. at 762, 96 S.Ct. at 1825–26. This characterization is correct even though the speech may have some non-commercial elements. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60,

(footnote continued)

demonstrations concerned lawful activity. *AFS v. SUNY*, 565 F.Supp. at 764–64. The court also determined that the interests of the University in (1) preventing disruption; (2) protecting the safety and security of the students; and (3) protecting students from commercial exploitation were legitimate and substantial. *Id.* at 764–65. Finally, the court determined that while the complete ban on commercial activities directly advanced the University's interests, it was, on the facts at hand, more extensive than necessary to serve those interests. *Id.* at 765–67.

65–68, 103 S.Ct. 2875, 2879–81, 77 L.Ed.2d 469 (1983); *American Future Systems v. Pennsylvania State University*, 752 F.2d 854, 860–62 (3d Cir.1984).

The court is similarly unconvinced that the speech at issue can be characterized as commercial with respect to AFS and pure with respect to the students. Although the "motivation of the listeners may occasionally be relevant to a conclusion about whether the speech is commercial, the essential nature of the speech remains unchanged regardless of whose rights are being adjudicated." *AFS v. Penn State*, 752 F.2d at 862. The speech rights of both the students and AFS are correctly characterized as commercial speech rights.[7] *AFS v. SUNY*, 565 F.Supp. at 762–63.

7. The plaintiffs place considerable emphasis on the fact that the AFS demonstrations result from "invitations" made by the students. They argue that such "invitations" distinguish this case from the commercial speech cases which involve unsolicited mass mailings. *See Bolger*, 463 U.S. at 2885, 103 S.Ct. at 75–76 (Rehnquist, J. & O'Connor, J. concurring). The distinction may have some merit under different facts. Here, however, the court concludes that the "invitations" in question resulted from unsolicited mailings and telephone calls promising vacations and other gifts. Using "common sense",

(footnote continued on following page)

Characterizing the speech in question as commercial does not end the search for an appropriate test, however.[8] This court is, as the Third Circuit was in *Penn State*, confronted with an unusual situation: "the intersection between government regulation of commercial speech and regulation of speech on government property." *AFS v. Penn State*, 752 F.2d at 862. The former is controlled by *Central Hudson* and its progeny; the latter is controlled by cases

(Footnote continued.)

the plaintiffs should not be permitted to distinguish this case on the basis of such induced invitations. The Supreme Court has encouraged such a "common sense" approach in the "commercial speech" area. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 2275, 85 L.Ed.2d 652 (1985).

8. In *AFS v. SUNY* this court did end the search for an appropriate standard once it characterized the speech in question as commercial. The court applied the *Central Hudson* test. The application of *Central Hudson*, therefore, became the "law of the case". The court is not now bound to apply *Central Hudson*, however. The "law of the case" does not rigidly bind a court to its former decisions, and it can be modified when justice requires. *Uniformed Sanitation Men Assoc., Inc. v. Comm'r of Sanitation*, 462 F.2d 619 (2d Cir.1970), *cert. denied*, 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972).

that distinguish between government property that is used as a public forum and that which is not so used. *See e.g. Perry Education Association v. Perry Local Educators*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). While the Third Circuit declined to apply the public forum test because it believed that dormitory rooms do not fit neatly into either the public forum or non-public forum mold, *AFS v. Penn State*, 752 F.2d at 863, this court concludes that the public forum standard is the most appropriate standard in this instance.

The court now subscribes to the public forum approach for several reasons. First, in applying the public forum doctrine to a case involving the use of a municipal stadium, the Second Circuit recently noted that, "recognition that protected speech is involved only begins the inquiry, since '[e]ven protected speech is not equally permissible in all places and at all times.'" *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir.1986) quoting *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985). Here, the court must decide whether protected commercial speech must be permissible in a state university dormitory. Second, other courts have made similar determinations using the public forum doctrine. *See e.g. Glover v. Cole*, 762 F.2d 1197 (4th Cir.1985) (Enforcement of a statewide policy prohibiting on-campus sales and fund raising activities by groups not sponsored by students or the college did not violate first amendment rights of individuals seeking to engage in such activities); *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir.1984) (University policy prohibiting door-to-door solicitation in its dormitories did not violate students' first amendment rights.) Finally, the rationale for the commercial speech line of cases is not applicable here, while the rationale for the public forum doctrine is relevant.

Commentators have explained that the rationale behind the commercial speech line of cases is to strike a balance between the government's interest in the regulation of business and commercial enterprises and the consumer's interest in the free market of information. *See J. Nowak, supra* at 928–43. Here, although SUNY expresses an interest in protecting its students from commercial exploitation, such an interest is not the primary motivation in the enforcement of the relevant regulations. The University is more concerned with maintaining the dormitories for their intended purposes.

This concern is the fundamental reason for the application of the public forum doctrine which involves determining appropriate places and times for speech activities. *See Perry*, 460 U.S. at 44–49, 103 S.Ct. at 954–57.

In considering whether the regulations in question unconstitutionally infringe on the first amendment rights of AFS and the students under the public forum doctrine, the court turns to the teaching of the Second Circuit in *Calash*:

[T]he Supreme Court has defined three categories of public property: the traditional public forum, including public streets and parks, dedicated to assembly and debate by "tradition or by government fiat;" the limited public forum, which the government has designated as "a place or channel of communication for use by the public at large . . . [or] for use by certain speakers, or for the discussion of certain subjects;" and the nonpublic forum, which is not "by tradition or designation a forum for public communication." The right to access to government property and the standards by which limitations on access must be evaluated vary according to the classification.

In the first category, the government must show that a content-based exclusion is necessary to serve a compelling state interest and narrowly drawn to achieve its purpose. The government can also impose narrow, content-neutral time, place and manner restrictions to serve a significant interest, so long as there remain adequate alternative channels of communication. With regard to the second category, although the government can close a limited public forum altogether, the Supreme Court noted that when the forum remains open to the public as a whole it is governed by the same standards as the traditional public forum. When the government, however, creates a limited public forum for the use of certain speakers or for the discussion of certain subjects, the first amendment protections provided to traditional public forums only apply to entities of a character similar to those the government admits to the forum. In the third category, the government can "reserve the forum for its intended purposes, communicative or otherwise" through reasonable restrictions on expression, so long as the regulations are not based on hostility to the speaker's

views. Indeed, "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Calash*, 788 F.2d at 82 (citations omitted).

B. *Application of the Public Forum Standards*

[3] The first step in the analysis is to determine the character of the SUNY dormitories because the permissible limitations on the use of public property for expressive activity depends on the character of the property at issue. *Perry*, 460 U.S. at 45, 103 S.Ct. at 955. The court agrees with the Third Circuit majority in *Penn State* that dormitory rooms do not fit easily into either the public forum or non-public forum classifications. *AFS v. Penn State*, 752 F.2d at 863. Nevertheless, the court does not shy away from the task.

Public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry*, 460 U.S. at 45, 103 S.Ct. at 955. Although, "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 273 n. 5, 70 L.Ed.2d 440 (1981), this

court concludes that student dormitory rooms do not constitute such public forums. There is no evidence to suggest that residence halls, unlike open areas on campus, have been devoted to assembly and debate. On the contrary, the plethora of regulations produced at trial demonstrate that the use of residence halls has been highly regulated.[9]

There is considerable authority, on the other hand, for the conclusion that university dormitories are non-public forums. In *Chapman*, the Fourth Circuit considered a student's claim that his university's policy of prohibiting door-to-door solicitation violated his first amendment rights. In applying the public forum doctrine, the court noted:

> The public property at issue here, residential areas of dormitories located on

9. The Supreme Court recognized the power of a University to regulate its campus in *Widmar*:

> [a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. *Widmar*, 454 U.S. at 267 n. 5, 102 S.Ct. at 273 n. 5.

> the campus of a state institution of higher learning, which has not by tradition or designation ever constituted a public forum for communicative purposes must be placed in the category of nonpublic forums. *Chapman*, 743 F.2d at 1059.

Furthermore, the concurring opinion of Judge Adams in *Penn State* concludes that the dormitories at Penn State were non public forums. *AFS v. Penn State*, 752 F.2d at 870–71 (Adams, J., concurring).

A conclusion that SUNY dormitories are non-public forums goes too far, however. The Second Circuit recently noted in *Calash* that the government may create a public forum for limited purposes. *Calash*, 788 F.2d at 83. SUNY has done so here.

The crucial factor in determining whether a limited public forum exists is the government's intent. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Id.* (quoting *Cornelius*, 105 S.Ct. at 3449). Relevant in determining the government's intent are the circumstances under which the forum was created and past use of the forum. *Calash*, 788 F.2d at 83. While there was

no evidence presented at trial regarding the creation of the dormitories, there was considerable testimony regarding their past use. Administrators and students alike testified that the dormitories have been used for a variety of social, cultural and educational activities. There can be no doubt that SUNY intended the dormitories to be used in such a manner. Therefore, the dormitories are limited public forums, at least with respect to the students, for the participation in social, cultural, and educational activities.

SUNY has not created a public forum for the commercial speech at issue here, however, SUNY's intent in maintaining a traditional non-public forum in that respect is abundantly clear. Resolution 66–156, in force for twenty years, demonstrates SUNY's intent to restrict commercial activity. Residence hall rules and regulations, agreed to by each resident, that prohibit such activity further demonstrates this intent.[10]

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10. The court does not imply that by signing a residential "license" the student waives his constitutional rights. Such a waiver would not be valid. *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir.1971). The students' agreement is not irrelevant, however. *See Bynes v. Toll*, 512 F.2d 252 (2d Cir.1975). Here, the agreement demon-

(Footnote continued on following page)

The University's decision to create a public forum for non-commercial activities, while maintaining a non-public forum for commercial activities, is proper. In *Calash*, the Second Circuit opined that "a public forum can be created for use only by certain speakers or for discussion of certain topics." *Calash*, 788 F.2d at 84, citing *Perry*, 460 U.S. at 46 n. 7, 103 S.Ct. at 955 n. 7. The *Calash* court determined that the City of Bridgeport could limit the use of its stadium to "civic, charitable, and non-profit speakers." *Calash*, 788 F.2d at 84. In addition, the Fourth Circuit recently decided that the campus of West Virginia State College was a public forum for the limited purpose of enriching the educational community, but non-public for commercial activity by non-student groups. *Glover*, 762 F.2d at 1201 & n. 7. SUNY can similarly limit the use of its dormitories to non-commercial activities.[11]

(Footnote continued.)
strates that the students were aware that SUNY did not open the dormitories as forums for commercial speech.

11. The plaintiffs offered uncontroverted testimony that commercial activity, like book sales and tutoring, occurs in the dormitories. Such evidence does not mandate that a public forum for commercial activity has been created, however. As noted in the text, government does not create a public forum by inaction or by permitting limited discourse.

[4] Classification of the SUNY dormitories as non-public forums for commercial activity does not end the inquiry. *Calash*, 788 F.2d at 84. As previously indicated, restrictions on the use of a non-public forum must be viewpoint-neutral and reasonable in relation to the forum's purpose. There can be no doubt that the restriction contained in 66–156 is viewpoint-neutral. Defendants testified that the regulation is applied even-handedly to pizza vendors, AFS, doctors, lawyers and any other person or entity motivated by profits. The University does not single out AFS. The University does permit student groups to conduct sales on campus, however. Such a distinction is not fatal. Distinctions based on speaker identity are permitted in non-public forums. *See e.g., Cornelius*, 105 S.Ct. at 3453 (distinction between charitable agencies providing direct services and legal defense and political advocacy organizations considered reasonable); *Perry*, 460 U.S. at 50–53, 103 S.Ct. at 958–59 (exclusion of one rival union reasonable); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304, 94 S.Ct. 2714, 2718, 91 L.Ed.2d 770 (distinction between commercial and political advertising reasonable).

There was controversy at trial as to whether the restriction is reasonably related to the forum's purpose, however. The plaintiffs presented testimony of expert educators to prove that the Resolution was unnecessary and unreasonable. For example, Dr. Krafft testified that the experience obtained by a student at an AFS demonstration was educational, and that the Resolution unnecessarily deprived students of the experience. Dr. Wachtman testified that the total ban of commercial activities was overbroad, and that SUNY could accomplish its objectives of assuring student safety and preserving an educational atmosphere through less restrictive means. Mr. Diamond, an Administrator at the University of Illinois, testified that a more narrowly drawn regulation, which permitted the kind of demonstration conducted by AFS, was successfully implemented at his campus. The plaintiffs also presented lay testimony to prove that the Resolution was unreasonable. Several AFS employees testified that many universities throughout the country permit AFS demonstrations, and that by and large the demonstrations are presented without complaint. Student plaintiffs and other students relayed that they desired to attend AFS demonstrations and that they

believed that SUNY's policy was unreasonable, particularly because they knew of more disruptive activity than an AFS demonstration occurring in the dormitories.

On the other hand, the defendants offered testimony to establish the reasonableness of the total ban on commercial activity contained in Resolution 66–156. Various administrators within the SUNY system testified that in their opinion a total ban on commercial activity was necessary to (1) preserve the educational environment of the dormitories, (2) assure student safety, (3) prevent commercial exploitation of students, (4) avoid the use of tax supported facilities for private commercial gain, and (5) prevent overcrowding in the dormitories. For example, Dr. O'Leary, President of SUNY–Albany, testified that many commercial enterprises desired to utilize campus facilities to tap the student market. Dr. O'Leary believed that a total ban was necessary to prevent the commercialization of the campus, which would detract from its educational environment. Furthermore, Dr. Franco, Director of Residence Life at SUNY–Cortland, testified that lifting the total ban would require extensive security and registration requirements at a prohibitive cost to the University and its students.

Although there is support in the record for the plaintiffs' position that a less restrictive measure might better balance the respective interests of the parties, there is no requirement here that the government's method of restriction be the best solution; it need only be reasonable. *Cornelius*, 105 S.Ct. at 3453. Dr. Morris, one of the plaintiffs' experts, admitted that there are differences of opinion with regard to educational policy. SUNY's position on commercial activities is one such reasonable opinion, which this court is hesitant to second-guess.[12]

This court cannot conclude that the total ban of commercial activity envisioned by Resolution 66–156 is unreasonable. The plaintiffs' challenge of Resolution 66–156 must therefore fail. Because the interim regulations were enacted solely in response to this court's preliminary injunction, which is of course now lifted, the plaintiffs' challenge with respect to those regulations no longer presents a controversy for this court

12. The court is particularly hesitant to second-guess defendants given the broad power of the states to formulate and implement educational policy, *see Bynes*, 512 F.2d at 256, and to control its university facilities, *see Widmar*, 454 U.S. at 273 n. 5, 102 S.Ct. at 276 n. 6.

to decide. Accordingly, the complaint herein is dismissed and judgment is granted for defendants.

IT IS SO ORDERED.

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
JUL 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2013

In The

Supreme Court of the United States

October Term, 1987

The Board of Trustees of the State University of New York, et al.,

Petitioners,

v.

Todd Fox, Edward R. Detweiler, Stephanie Vaiano, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

HENRY T. REATH
(Counsel of Record)
WAYNE A. MACK, JR.

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-3428

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

This case involves the constitutionality of a regulation adopted by the State University of New York ("SUNY") which completely prohibits students from inviting into their dormitory rooms, to speak with and listen to, anyone who furnishes information or provides a product or service from which the invitee may derive a profit.

The question presented is whether the Second Circuit Court of Appeals correctly applied the commercial speech test of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), in analyzing the constitutionality of the blanket prohibition upon the students' free speech rights.

LIST OF PARTIES

The parties before the United States Court of Appeals for the Second Circuit were:

(1) Todd Fox, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellen and Jaclyn Bernstein, respondents herein;

(2) The Board of Trustees of the State University of New York and Clifton R. Wharton, Jr., individually and as Chancellor of the Board of Trustees and the State University of New York College at Cortland, and James M. Clark, individually and as President of the College at Cortland, and the State University of New York at Binghamton, and Clifford D. Clark, individually and as President of the State University of New York at Binghamton, and the State University of New York at Albany, and Vincent O'Leary, individually and as President of the State University of New York at Albany, and the State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, individually and as President of the College of Arts and Sciences at Potsdam, petitioners herein.

Amici curiae before the Second Circuit on behalf of respondents were the Student Association of the State University of New York, Inc., the Student Association of the University of Albany, the University at Albany's Tenant Association, the Cortland College Student Association, and American Future Systems, Inc.

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No. 87-2013

In The

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Todd Fox, Edward R. Detweiler,
Stephanie Vaiano, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Todd Fox, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan, and Jaclyn Bernstein (all students enrolled at colleges and universities within the SUNY system) respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 841 F.2d 1207 (2d Cir. 1988).

OPINIONS BELOW

Petitioners' presentation of the opinions below fails to cite the initial opinion in this case wherein the United

States District Court for the Northern District of New York preliminarily enjoined the regulation at issue. That opinion is reported at 565 F. Supp. 754 (N.D.N.Y. 1983).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. XIV, § 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUNY Resolution 66-156 as amended by Resolutions 73-26 and 79-100

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, bank, barber and beautician services and cultural events.

COUNTERSTATEMENT OF THE CASE

This case involves the constitutionality under the First Amendment of a regulation, adopted by a public university, which completely prohibits students from

inviting to their dormitory rooms to speak with and listen to anyone who furnishes information or provides a product or service from which the invitee may derive a profit. It is brought by students seeking to exercise their rights to invite, listen and speak with others and their rights to use their dormitory rooms – the private space furnished by the State as their home – for any lawful, safe or nondisruptive educational, social, cultural or other exercise of free speech, free of government censorship and restraint.

Throughout this case, petitioners have refused to acknowledge the students' rights which are at issue and focused exclusively on the rights of third parties to gain uninvited access to university facilities. This is strikingly evident from petitioners' statement of the case which is entirely devoted to an unsupported discussion and distortion of the record regarding the commercial activities of third parties on campus, rather than the facts bearing on the only issue involved, which is the scope of students' rights to invited speech in their private rooms. In so doing, SUNY attempts to turn a students' rights case on its head.

The Basic Facts

The uncontraverted, case-dispositive facts, which SUNY chooses to ignore, are summarized below:

SUNY requires all freshmen, sophomores and new transfer students to live in college-operated housing. Only students over 21 years of age, married students, students with prior military service, and students living at home with parents are exempt. (Record at 104, 189-90).

SUNY guarantees students the constitutional rights of speech and privacy within their dormitory rooms. Students are protected from invasions of privacy and

arbitrary and capricious searches of their residences by the requirement that law enforcement officials seeking entry to a student's room must have a search warrant. Further, SUNY recognizes that "college students are citizens as well as members of the academic community. As citizens, students should enjoy the same freedom of speech . . . that other citizens enjoy." (Record at 169; Exhibit 26 at 5-6).

Notwithstanding these guarantees, SUNY has chosen to implement and enforce a draconian regulation which infringes upon its students' free speech rights, without presenting any evidence that the regulation directly advances the university's interests. That regulation, Resolution 66-156, was enacted by the SUNY Board of Trustees and states as follows:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, drycleaning, banking, barber and beautician services and cultural events.

Pursuant to this regulation, students on SUNY campuses are prohibited from bringing into their dormitory rooms invitees "which furnish information [or] provide a product or service where the end result is the intent to make a profit by the invitee." (Record at 187-88). Included within the class of speakers which the students are prohibited from inviting and communicating with are lawyers, women's health physicians, job counselors, stockbrokers, student tutors and untold others. (Record at 113-15, 373-77, 485-87).

Resolution 66-156, as amended and enforced, is intended by petitioners to be a total, absolute ban on the students' speech. It is applicable to speakers who receive

genuine and bona fide invitations from students to their dormitory rooms, as well as to uninvited door-to-door solicitors and other unsolicited uninvited speakers. In addition, it is applicable to speakers whose speech involves and furnishes the students with substantial and educational informational content. Finally, the regulation is equally applicable to lawful, safe, nondisruptive and non-exploitive activity as to unlawful and unethical activity. (Record at 373-384).

Respondents are SUNY students who have expressed a genuine and bona fide desire to participate in discussions with their own and any other student's invitees and to invite persons of their choosing to their dormitory rooms. The students are barred from doing so solely because the invitee may be paid for such services. Many of the students who desire to take advantage of such right-to-listen opportunities are motivated by social, educational and other non-commercial factors. (Record at 114-15, 199-200, 255, 257-58, 261-62, 274-75, 277).

SUNY has not made nor offered to make alternative space available to these students where they can meet and communicate with the class of prohibited invitees. (Record at 503-4). Moreover, even if SUNY had offered such space, the students consider their dormitory rooms, furnished by the State as their home while on campus, as the only convenient, practical and safe place where such communications can take place. (Record at 120).

SUNY's draconian regulation runs counter to the mainstream of rules and practices of residential colleges and universities throughout the nation. They sensibly ban door-to-door solicitation and the operation of a business on campus by third persons or students, but do permit students to invite any guest, without limitation, to their private dormitory rooms, subject only to reasonable visiting hours, registration and/or escort procedures, which

are in effect on many, but by no means all, campuses. (Record at 93-4, 325-26, 385-93).

SUNY has been aware of the success of these less restrictive measures which have been implemented by other State universities for over 10 years. Nevertheless, they collected no evidence to validate the need for their total ban. (Record at 496, 603-8, 696-99, 789-90). Rather, they speculate, without offering evidentiary support, that the draconian ban is necessary: (1) to protect students from commercial exploitation; (2) to prevent disruption in the residence halls and thereby maintain a proper educational atmosphere; (3) to protect the safety and security of the dormitory residents; and (4) to further the governmental proprietary interest in managing residence hall affairs. (Record at 491-99).[1] SUNY concedes that the truth

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1 The sole "support" petitioners posit for the total ban is the experience of one SUNY campus in permitting commercial vendors to set up booths on campus. (Petition at 4). The record is clear, however, that this experience had nothing to do with the system-wide prohibition on invited speech in students' private rooms involved in this case. The situation to which petitioners refer concerned outdoor commercial booths set up on a podium in front of the campus student center (far removed from students' private rooms) at SUNY-Albany in the early 1980s. (Record at 748). SUNY can point to no evidence that a comparable situation ever existed within the residence halls, or that it involved invited speech. Indeed, even the district court did not credit that testimony as a basis for its order.

Likewise, petitioners' contention that they would have to establish expensive and elaborate checkpoint facilities if students were permitted to invite professional guests to their rooms is based on sheer conjecture, utterly without support in the record. (Record at 327-28, 603-8). Moreover, it is disingenious to make such an argument considering

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or deceptiveness of any of the communications which are prohibited was not at issue, nor was it a motivation for the ban. (Record at 7-8, 61-65).

Action For Injunctive Relief

This case arose when Kathy Rapp, a representative of American Future Systems, Inc. ("AFS"), was invited by a SUNY student to meet with a group of other SUNY students in a private dormitory room.[2] SUNY officials interrupted the meeting and ordered her to leave. After consulting with her invitor student host, she refused, stating that she and the students had a constitutional right to meet in the private room. Thereafter, Kathy Rapp was arrested, handcuffed and charged with loitering, soliciting without a permit, and trespass. (Record at 19-23).

Following the arrest, Kathy Rapp, Todd Fox (a SUNY student denied permission to meet with an invitee in his room), and AFS brought suit seeking declaratory and

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(Continued from previous page)

the fact that the SUNY regulation applies across-the-board, even on SUNY campuses where similar security devices are already in place.

2 AFS is a corporation which at the invitation of a student and friends, demonstrates and sells cookware, china, crystal, and tableware on college campuses throughout the United States. Testimony at trial established that AFS is not engaged in door-to-door solicitations, and SUNY stipulated that the prohibition at issue concerns *invited* demonstrations. Throughout the litigation, AFS asserted only that it had a secondary and derivative speech right, which was totally dependent upon the students' rights as invitors and listeners. AFS did not join in the appeal from the district court's order and it is not a party before this Court.

injunctive relief.[3] The Complaint alleged that the SUNY regulation violated the SUNY students' First Amendment pure free speech and commercial speech rights.[4]

District Court's Grant of Preliminary Injunctive Relief

The district court preliminarily enjoined Resolution 66-156 on the ground that it infringed on the students' commercial speech rights. The district court utilized the standard established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), concluding that although SUNY may have legitimate purposes for the policy, there was no evidence that the policy directly advanced those purposes or that the purposes could not be served as well by a more limited restriction on speech. 565 F. Supp. at 765-67.

Trial On The Merits

Following a non-jury trial on the merits, the district court dissolved its preliminary injunction and sustained the SUNY policy. 649 F. Supp. at 1402. Again the district court characterized the speech at issue as commercial speech, but eschewed the *Central Hudson* standards which it had followed at the preliminary injunction stage. *Id.* at 1397-99. Instead, the district court adopted the public

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[3] After the action was instituted, a number of other students joined in the action expressing their concerns and those of their peers. These students included two elected presidents of student government, one elected vice president and a number of other elected student representatives.

[4] Throughout this case, including on appeal, respondents have argued that the SUNY regulation infringes on the students' *pure* free speech rights to the extent that the students desire to *invite and learn* from attorneys, women's health physicians and other professionals.

forum analysis which it had emphatically rejected earlier in the proceedings. *Id.* at 1399. Following that analysis, the district court concluded that a university dormitory was a "limited public forum" from which the State had reasonably excluded a particular class of speakers. *Id.* at 1400-01. The district court, while conceding that there was evidence of less restrictive measures that would further the intended purposes of the ban, held that the regulation need only be reasonable to withstand scrutiny under the public forum analysis. *Id.* at 1401-02. Stating that it would not "second-guess" the SUNY officials' belief that the regulation was reasonable, the district court denied the relief requested by the students. *Id.* at 1402.

The Second Circuit Court of Appeals' Reversal

On appeal, the Second Circuit Court of Appeals reversed and remanded, ruling that the "SUNY regulation survived constitutional scrutiny below only because the First Amendment rights of students were ignored." 841 F.2d at 1214.

The Second Circuit held that "students who are required to live on campus and in a dormitory room should not be deprived of any rights to free speech or expression that they would have were they living off campus, absent a showing by the university that its educational mission would be materially disrupted." *Id.* at 1211. The Second Circuit rejected the *public forum analysis* reasoning that the issue involved in the case was *not* a third person's right of access to State owned property, but the speech rights of students who have an undisputed right of access to their rooms as well as privacy rights. *Id.* at 1212.

In analyzing the constitutionality of the SUNY regulation, the Second Circuit followed the well established

four part commercial speech test set forth in *Central Hudson*, 447 U.S. at 561-66. The Second Circuit held that the first prong of that test was not at issue since SUNY had stipulated that the speech contained lawful activity and was not misleading. 841 F.2d at 1213. It further found that the second prong of the test was met in that SUNY's interests were substantial, but noted that the district court had not determined whether the regulation directly advanced those interests. *Id.*[5] Therefore, the Second Circuit remanded the case to the district court for it to consider whether the third prong of the test had been met.

The Second Circuit also questioned whether the SUNY regulation met the fourth prong of the *Central Hudson* test. That prong requires that the government regulation be no "more extensive than is necessary to further [the State's] interests." *Central Hudson*, 447 U.S. at 556. The Second Circuit ruled that this element of the *Central Hudson* test required the State to employ the "least restrictive means" available to advance its interests, not a reasonable means, pointing at the district court's concession that there were less restrictive means available to SUNY to advance its interests. 841 F.2d at

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[5] Respondents argued below that SUNY had utterly failed to meet the burden, which was clearly theirs, to establish by hard evidence, not mere speculation and conjecture, the alleged dire consequences if the regulation were struck down. *See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 509 (1969); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1971); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977); *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 648-49 (1985).

1214. Accordingly, the Second Circuit also remanded the case for appropriate findings under that analysis.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

SUNY's petition for certiorari is a remarkable document which must be extraordinarily perplexing to one not familiar with this case. Rather than addressing the facts and legal issues which, as the Second Circuit recognized, control this very fact bound case, petitioners choose to ignore these facts and issues, presumably and understandably because they cannot be contested and do not merit review by this Court.

Petitioners then proceed to present a highly incorrect version of the facts and issues, without a single reference to the record below. Thus, before addressing the legal issues, we must set the record straight as to what this case is all about and what it is not about.

This case is *not about*:

- ¶ The right of third party peddlers to gain uninvited access to public property or randomly to knock on doors and sell their goods and services to students at a public university.
- ¶ It is not about the right of any third person to gain uninvited access to a *public forum* to exercise commercial or free speech rights; nor is it even about the right of third parties to gain uninvited access to a student's private room to exercise its commercial speech rights to promote or sell goods and services.
- ¶ It is not about the truth or deceptive nature of any communications involved – since this issue was

specifically removed from the case by stipulation of the petitioners' counsel at trial.

¶ Finally, it is not about any kind of a *time, place, and manner* restriction, since the regulation attacked is an absolute ban on any such activity. Petitioners never made any such legal contention at the trial, and never offered a bit of evidence as to any alternative places, or times on campus (reasonable or otherwise,) when students could exercise their First Amendment rights to listen and learn about the many subjects of invited free speech in which they are interested.

To the contrary, this case *is about*:

¶ The right of students to use their private room as their home away from home, their castle, so to speak, to invite guests of their choosing and on the host's terms to receive invited speech, so long as the activity is quiet, peaceful and non-disturbing to other members of the dormitory.

¶ It is about the right of students to listen and learn about a whole range of subjects that are foreclosed by the university's draconian ban on student invited speech where the invited speaker seeks to make a profit from his or her appearance.

In sum, the students bringing this action represent the vast majority of ordinary college students who seek nothing more than to exercise their constitutional right to decide for themselves, without interference from the State, what topics they wish to discuss, and with whom, within the peace and privacy of their own campus living rooms. During these critical years of their education and training for life, these young people should be assured that the Constitution and law work as well for them as for some of their more strident or controversial contemporaries who test the outer limits of First Amendment rights.

As we develop in the sections of this brief that follow below, there are three independent grounds for denying the writ of certiorari in this case:

First, the Second Circuit correctly followed the decisions of this Court in analyzing the effect of the SUNY regulation upon the students' free speech rights.

Second, the asserted conflict with the Third Circuit's decision in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985) (*"Penn State"*), regarding application of the less restrictive means analysis under the *Central Hudson* test is illusory. It is clear that the Third Circuit's substitution of a test of "reasonableness" for a test of "less restrictive means" was based on a misreading of this Court's decisions. This has been reaffirmed by this Court in at least three decisions handed down since the Third Circuit's opinion, which hold that a restriction on commercial speech cannot survive constitutional scrutiny if there is a *less restrictive means* available to the State to advance its interests. Moreover, the other circuits have not formed precise differences of opinion meriting review at this time.

Finally, this case is not ripe for review because the Second Circuit's decision was interlocutory. The Second Circuit remanded the case to the district court with direction that it enter appropriate findings as to whether the regulation directly advanced the State's interests and was the least restrictive available means. Allowing the case to proceed to its final disposition below may produce a result that makes it unnecessary to address any questions presented here.

II.
THE SECOND CIRCUIT'S HOLDING IN THIS CASE IS CONSISTENT WITH THE DECISIONS OF THIS COURT

The threshold determination in any First Amendment case involves the nature of the speech rights at stake. In this case, the Second Circuit identified the rights at stake as those of students to invite and receive commercial information in their private rooms. Therefore, the Second Circuit utilized the commercial speech standard of *Central Hudson* to measure the constitutionality of the infringement.

Petitioners challenge the Second Circuit's application of the commercial speech standard to the students' rights on two grounds. First, they argue that the Second Circuit misinterpreted the fourth prong of the *Central Hudson* test requiring that an infringement on commercial speech be "no more extensive than necessary."[6] Second, petitioners contend that the Second Circuit should not have utilized the commercial speech test at all to analyze the students' rights, but rather *public forum* or *time, place and manner analysis*.

Neither of these contentions merits review by this Court. The prior decisions of this Court make clear that the Second Circuit's application of the commercial speech

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[6] Petitioners advance totally inconsistent positions with regard to the interpretation of this prong. Initially, petitioners state that *Central Hudson* does not require the State to utilize the least restrictive means available, but permits the State to choose any reasonable means. (Petition at 12). Later, petitioners state that *Central Hudson* does require the State to utilize a less restrictive means if the means vindicates the interest at stake. (Petition at 12, 13).

test in this case was entirely proper. *Central Hudson* and its progeny establish that an infringement on commercial speech may not stand if there is a less restrictive means available to the State to advance its interest.

Likewise, this Court's decisions establish that the *public forum analysis* and the corollary *time, place and manner analysis* have no place in this case dealing solely with the constitutional rights of students to invite and receive information in their dormitory rooms where they have an undisputed right of privacy and use. Indeed, SUNY did not even argue that the *time, place and manner analysis* was applicable to this case in the district court thereby waiving any right to make such a contention now.

A. The Second Circuit Correctly Ruled That The Commercial Speech Standard Requires The State To Utilize The Least Restrictive Means Available To Advance Its Interest.

The seminal case in the commercial speech context is *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). In that case, this Court firmly established that the First Amendment protects commercial speech from unwarranted governmental regulation, reasoning that "commercial expression assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-62.

Central Hudson set out a four part test to measure the constitutionality of an infringement upon commercial speech:

1. The expression "must concern lawful activity and not be misleading;"

2. The State must assert a "substantial interest" to be achieved by the restriction;

3. The restriction must "directly advance the governmental interest asserted;" and

4. The restriction must be no "more extensive than is necessary" to serve the governmental interest.

Id. at 566.

In *Central Hudson*, the Court described the "no more extensive than necessary" prong of the test as the "critical inquiry" in that case. 447 U.S. 569-70. In invalidating the complete suppression of commercial speech at issue, the Court made clear that this criterion required the State to employ the least restrictive alternative available. The Court emphatically pointed out that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 564. The Court struck down the regulation at issue in *Central Hudson* stating that "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests" and that "[i]n the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising." *Id.* at 570-71 (footnote omitted).

This Court reaffirmed that the fourth prong of *Central Hudson* required the State to utilize the least restrictive means available to advance its interest in *In re R.M.J.*, 455 U.S. 191 (1982). There the Court struck down an absolute prohibition on a particular form of attorney advertising on the ground that the regulation was more extensive than necessary. *Id.* at 190. The Court noted that there was no evidence "that an absolute prohibition is the only solution" and that "[t]here is no indication in the record of a failed effort to proceed along . . . *a less restrictive path.*" *Id.* (footnote omitted) (emphasis added).

Likewise, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court struck down an absolute prohibition on the use of illustrations or pictures in attorney advertising.[7] Using the very term which petitioners claim this Court has not adopted, the Court stated that the *Central Hudson* test required

> the State to present a substantial governmental interest justifying the restriction . . . and to demonstrate that the restriction *vindicates that interest through the least restrictive available means.*

Id. at 647 (emphasis added). The Court held that the fourth criterion of the test had not been met since the State offered "no evidence or authority of any kind for its contention that the potential abuse associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban." *Id.* at 648.

In two recent commercial speech cases, this Court also endorsed the less restrictive means analysis as part of the *Central Hudson* test. In *Posadas De Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 106 S. Ct. 2968 (1986), the Court analyzed a statute restricting the advertising of casino gambling aimed at residents of Puerto Rico. In sustaining the statute, the Court noted that the "narrowing construction" of the advertising restrictions announced by the lower court assured that the regulation was no more extensive than necessary. 106 S. Ct. at 2978.

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[7] *See* discussion below at 28-29, concerning the effect of this decision upon the "conflict" which petitioners' claim exists between the Second Circuit's decision in this case and the Third Circuit's decision in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985).

The Court deferred to the legislature's assessment that the promulgation of additional speech to discourage gambling would not be effective as a less restrictive alternative, quoting from a circuit court case which ruled that the promulgation of additional speech was not a "less restrictive" alternative. *Id.* (quoting *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir. 1983)(en banc), *cert. denied*, 467 U.S. 1259 (1984)). In addition, the Court implicitly rejected the reasonable relationship test for commercial speech advanced by petitioners holding that "rational basis" equal protection analysis was easier to satisfy than the third and fourth prongs of *Central Hudson*. *Id.* at 2979.

Finally, in *Shapero v. Kentucky Bar Ass'n*, 56 U.S.L.W. 4532 (U.S. June 13, 1988), this Court granted certiorari to resolve the very issue involved here – whether a blanket prohibition on commercial speech was permissible under the First Amendment. The Court struck down the regulation involved in *Shapero*, a categorical prohibition on the solicitation of legal business through targeted correspondence with potential clients known to face particular legal problems, relying extensively on *Zauderer*. The Court concluded that the *Central Hudson* criteria were not met because "[t]he State can regulate such abuses and minimize mistakes *through far less restrictive and more precise means.*" *Id.* at 4534 (emphasis added).

Thus, the applicable standard in the commercial speech context is well-settled and does not merit further attention here. Beginning in *Central Hudson*, and in the recent decisions cited above, this Court has gone to great lengths to explain the constitutional analysis required, including the necessity of utilizing the less restrictive alternative test as an element of the commercial speech standard. What is involved here is merely the application of these established principles to a very fact bound case.

Petitioners' reliance on cases such as *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), for the proposition that the less restrictive means analysis is not an element of the *Central Hudson* test is misplaced. *First*, this position flies in the face of the language of *Central Hudson* and of the numerous decisions cited above. *Second*, these cases do not apply the *Central Hudson* test, but the *time, place and manner test* applicable to *public forums*.[8] *Third*, contrary to petitioners' assertion, this Court has frequently utilized less restrictive means analysis in *time, place and manner* cases. *See, e.g., Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 635-39 (1980).[9]

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8 Although both the *Central Hudson* test and the *time, place and manner test* require that the statute be narrowly drawn, an express element of the *time, place and manner test* is that the regulation leave open ample alternative channels of communication. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). This element protects against total prohibitions on speech such as that at issue here. Because the ample alternative channels criterion is not an express element of the commercial speech test, it is necessary to engage in the least restrictive means analysis to assure that regulations are carefully drafted.

9 A number of circuit courts have ruled that the least restrictive means test is part of the *time, place and manner analysis*. *See City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1551-53 (7th Cir. 1986), *aff'd mem.*, 107 S. Ct. 919 (1987); *Acorn v. City of Frontenac*, 714 F.2d 813, 818 (8th Cir. 1983); *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 238-39 (2d Cir. 1982).

The necessity of utilizing the less restrictive means analysis, rather than reasonable relationship analysis, in commercial speech cases is clear from the facts of this case. SUNY has implemented and enforced a draconian policy which is not only an insult to the principles of uncensored, open inquiry and discussion for which any great university stands,[10] but also is unnecessary and arbitrary. The policy runs counter to the rules and practices of the majority of residential colleges and universities through the nation.[11] These schools ban door-to-door solicitation and the operation of a business on campus, but permit students to invite commercial guests to their rooms.[12] SUNY concedes the prohibited speech is lawful and not misleading, and offered no evidence or studies of any kind to support the regulation.[13] Yet, the district court sustained the regulation stating that SUNY

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10 SUNY concedes that the proper function and role of a university is to promote the "freedom of expression and freedom of inquiry." (Record at 772).

11 For example, testimony was presented at trial by the Chancellor of Temple University and the Special Assistant to the Chancellor of the University of Illinois Urbana-Champaign regarding their success in implementing less restrictive alternatives. (Record at 96-97, 385-394). Testimony was also presented of additional examples including Indiana University, Indiana State University, Ball State University, the University of Kentucky, Eastern Kentucky University, Morehead State University, the University of South Florida, the University of Central Florida, Florida State University, the University of Miami and Auburn University. (Record at 302, 320).

12 See counterstatement of the case, *supra* at 5, 6.

13 As noted above, *supra* at note 5, SUNY's failure to offer any evidence in support of the need for the regulation is fatal.

had a "reasonable" belief that the regulation was necessary.

Certainly, the First Amendment provides a greater degree of protection to lawful and truthful commercial speech than the simple requirement that the promulgators of the regulation believe the regulation is necessary and reasonable. Otherwise, *Central Hudson*, *In re R.M.J.*, *Zauderer*, and *Shapero*, would not have been decided the way they were. If, as here, the State presents no evidence in support of the bans while there is *record evidence* that a less restrictive alternative has been successfully implemented throughout the nation and that the alternative satisfactorily advances the asserted interest, the infringement simply cannot stand.[14]

In short, as the Second Circuit correctly ruled in this case, the least restrictive means analysis is a necessary and established part of the *Central Hudson* test. Obviously, *Central Hudson* means what it says. An infringement on commercial speech may not withstand scrutiny if it is "more extensive than necessary" or a "more limited

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14 Petitioners' contention that utilization of the less restrictive means analysis in commercial speech cases "creates an improper parity between commercial and non-commercial speech" is totally without merit. There are several significant differences in the protection afforded. For example, the State has absolute power to control commercial speech which is unlawful and misleading, *Central Hudson*, 447 U.S. at 563. With regard to non-commercial speech, the State's power is much more limited. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105 (1973). Moreover, there is an important distinction between a substantial State interest and a compelling State interest. *Compare Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 541-42 (1980) and *Central Hudson*, 447 U.S. at 568-69.

restriction" would suffice. 447 U.S. at 568. There is no need for this Court to grant certiorari to decide an issue which petitioners concede,[15] and on which the Court has so recently and repeatedly spoken.

B. The Second Circuit Correctly Applied The Commercial Speech Standard Rather Than Public Forum Or Time, Place And Manner Analysis.

The Court of Appeals' decision to follow the commercial speech standard of *Central Hudson* was based upon a recognition that the rights of students to invite and receive information in their private rooms, not third parties' rights of access to public property, were at stake in this case.

Petitioners, once again focusing on the rights of third persons who are not parties to this proceeding, rather than on the speech rights of their students which are at issue, argue that this determination was erroneous and that *public forum* or *time, place and manner analysis* are proper.[16]

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15 *See* Petition at 12 where SUNY states that *Central Hudson* requires the State to use a "less restrictive" alternative if it serves the governmental interest as well.

16 Petitioners obviously advance the *forum* and *time, place and manner analysis* in an effort to escape the "no more extensive than necessary" prong of *Central Hudson*. As noted above, however, *supra* note 9 and accompanying text, utilization of *time, place and manner analysis* does not enable petitioners to escape the least restrictive means test.

Moreover, both *forum* and *time, place and manner analysis* require that the regulation leave open "ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). This is

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It is well established and beyond dispute, however, that college students, including those living in dormitory rooms, are entitled to a full measure of First Amendment protection on college campuses. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," or dormitory room door. *Hazelwood School Dist. v. Kuhlmeier*, ___ U.S. ___, ___, 108 S. Ct. 562, 567 (1988) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). In fact, this Court has held that the speech rights of college students are entitled to a particularly high degree of First Amendment protection:

> [S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment . . . [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply

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a requirement which the district court did not consider in sustaining the regulation, and petitioners cannot meet because they presented no evidence to the district court on the issue at trial. Quite simply, there are no alternative sites available to students on campus. Suggesting that students meet off campus or listen to the radio or television is not a reasonable, realistic or ample alternative. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977). Furthermore, the *time, place and manner* contention was not made in the district court and, therefore, is not a proper subject for this Court's review. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). Finally, the regulation is directed at one form of speech only and therefore is not content neutral as required for a legitimate *time, place and manner* restriction. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 771 (1976).

with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is no where more vital than in the community of American schools."

Healy v. James, 408 U.S. 169, 180 (1972) (citation omitted).

One of the constitutional rights enjoyed by students is the right to receive information. *See Board of Education v. Pico*, 457 U.S. 853, 867 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965). This is important to prepare "students for active and effective participation in the pluralistic, often contentious society in which they will soon become adult members." *Pico*, 457 U.S. at 868. The right to receive information includes the right to receive commercial information which is at the heart of the commercial speech doctrine. *Central Hudson*, 447 U.S. at 561-62, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 756-57, 763-765.

Under New York law, a student's private dormitory room is the equivalent of his or her home. *People v. Cohen*, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969). Therefore, petitioners have recognized, as they must, that students enjoy the constitutional freedoms of speech and privacy within their rooms, including the right to receive commercial information, to the same extent that adults do within their homes.[17]

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[17] This Court has recently commented on the unique constitutional significance of the home in *Frisby v. Schultz*, 56 U.S.L.W. 4785 (U.S. June 27, 1988):

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Under a *public forum analysis* or *time, place and manner analysis* advocated by petitioners, however, no constitutional significance at all is attached to the fact that this case involves students' rights to receive information, nor to the fact that a dormitory room is a student's home. Instead, a dormitory room is relegated to a class of public, quasi-public or non-public fora where the State is permitted to curtail expressive conduct in the interests of free traffic flow, public safety, etc. A student's private room is the antithesis of such areas, in that:

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> Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick" and have recognized that "[p]reserving the sanctity of the home, the one retreat from which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."

Id. at 4788 (citations omitted).

In addition, the Court has stated that the First Amendment demands that a high degree of protection be given to activities taking place within one's home:

> If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Stanley v. Georgia, 394 U.S. 557, 565 (1969). *Cf. Stoner v. California*, 376 U.S. 483, 490 (1964); *Chapman v. United States, 365 U.S. 610 (1961); McDonald v. United States*, 335 U.S. 451 (1948). The First Amendment also means that a State has no business telling a person sitting alone in his home what guests he or she may entertain. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

(1) students have a property interest in such space;

(2) the State is only acting as landlord with respect to such space;

(3) the State compels students to live in such space;

(4) the room is the student's home; and

(5) the State has recognized and agreed to respect the students' constitutional rights.

The decisions of this Court make clear that the *public forum analysis*, and the corollary *time, place and manner analysis*, were never meant to apply to a regulation on invited speech taking place within such a unique and highly protected area as a student's home. Rather, *public forum* and *time, place and manner analysis* are sensibly limited to cases involving a third party's right of forced access to government property to engage in conduct inconsistent with the property's intended purpose.[18]

In short, as both a matter of law and common sense, a home is not a forum. Therefore, as the Second Circuit recognized, and the decisions of this Court establish, the

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[18] *See Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 801 (1985) ("[a]s an initial matter a speaker must seek access to public property"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49-51 n.9 (1983) (distinguishing non-access cases); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 539-40 (1980) (rejecting public forum analysis in cases involving utility's right to use its own property for speech purposes); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 512 n.6 (1969) (rejecting public forum analysis on grounds case involved "the constitutional rights of [students] entitled to be [on the property]").

students' rights at issue do not turn on any kind of forum analysis.[19]

III.
THE ASSERTED CONFLICT WITH THE THIRD CIRCUIT COURT OF APPEALS IS ILLUSORY.

In an effort to obtain review by this Court, petitioners point to an apparent conflict between the Court of Appeals' decision in this case and the Third Circuit's decision in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985). That conflict, however, is illusory due to factual differences in the cases, and most importantly, due to the intervening decisions of this Court that,

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[19] It is essential to note that this case does not involve a third party's right to engage in door-to-door solicitation on university property. *Compare Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). In a door-to-door solicitation case, courts follow a *public forum analysis* because the issue is whether the third party may gain access to government property. No such issue is involved here; rather the issue is whether students have a right to invite guests to their private rooms.

The above is a fundamental distinction frequently recognized by this Court. *See Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943) (defining solicitors as "persons not specifically invited"); *Breard v. City of Alexandria*, 341 U.S. 622, 631 (1951) (distinguishing between solicitation and invited speech in sustaining ordinance which banned uninvited door-to-door peddlers). *Cf. Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 76 (1983) (Rhenquist, J., concurring); *United States Postal Service v. Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 152 (1981) (Stevens J., dissenting).

as noted above, reaffirm the reasons for and viability of the fourth prong of the *Central Hudson* test, i.e., the less restrictive alternative analysis.

In *Penn State*, the Third Circuit upheld a university regulation which prohibited students from inviting into their dormitory rooms any firm or organization which solicited money or sold or solicited any product or service. The regulation permitted students to meet with third parties on a one-on-one basis in the student's room and to meet with third parties at an on-campus hotel.

In analyzing the regulation, the Third Circuit flatly rejected the *public forum* and *time, place and manner analysis* so adamantly advanced by petitioners, reasoning that students' "dormitory rooms do not fit neatly into either the public forum or the nonpublic forum mold." *Id.* at 863. Instead, the Third Circuit utilized the *Central Hudson* test which was also utilized by the Second Circuit here. The Third Circuit, however, reached a different conclusion than the Second Circuit, ruling that the university had chosen an acceptable alternative although a less restrictive alternative could have served to accomplish its proffered interests. *Penn State*, 752 F.2d at 866.

The conflicting results between *Penn State* and this case do not merit review for the following reasons:

First, and most importantly, the Third Circuit entered its decision before this Court's ruling in *Zauderer, supra*, 471 U.S. 626. That case, as well as *Posadas* and *Shapero*, establish that the less restrictive means analysis is an element of the commercial speech standard. For example, in *Zauderer*, the Court specifically held that the commercial speech test requires a showing that the prohibition is "the least restrictive available means." *Id.* at 647. Likewise, in *Posadas*, the Court examined whether less restrictive alternatives were available to the State, 106 S.Ct.

2978, and in *Shapero*, ruled that the State was required to utilize a "less restrictive" means. 56 U.S.L.W. at 4534. Therefore, the Third Circuit's ruling that a regulation may stand in the face of less restrictive alternatives has no weight.[20] Any uncertainty or conflict has been resolved by these intervening decisions.

Second, the Third Circuit panel erroneously treated the *Penn State* case, as does the SUNY petition here, as one essentially involving the rights of a commercial third party for uninvited access. In the process, the court ignored and subverted the students' rights involved. The Second Circuit, on the other hand, addressed a different issue, the rights of students to invite others and to receive information in their private rooms.

Third, unlike SUNY, Penn State made alternative on-campus facilities available to its students to engage in the prohibited speech. *Penn State*, 752 F.2d at 868.

Finally, perhaps due to the clarity with which this Court has spoken, the other circuit courts have not yet given concentrated attention to the precise issue raised by petitioners. Accordingly, there is no clearly defined conflict meriting review at this time.

IV.
THE SECOND CIRCUIT'S HOLDING IS NOT RIPE FOR REVIEW.

Petitioners request this Court to review an interlocutory decision of the Court of Appeals. That alone is a

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20 The plaintiffs in *Penn State* filed a Petition to Recall the Mandate and for Rehearing In Banc based on this Court's decision in *Zauderer* which was denied by the Third Circuit.

sufficient basis for denial of a writ of certiorari. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court"); *American Construction Co. v. Jacksonville T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

The rationale for this rule is self-evident. This case was remanded by the Second Circuit to the district court for appropriate findings on two distinct issues. For example, the district court could, as respondents believe it must do, find that the petitioners utterly failed to meet their burden to show that the regulation directly advanced the State's interests and, therefore not even reach the least restrictive means issue. Thus, it is premature to consider the issues raised by respondents.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

HENRY T. REATH
(Counsel of Record)
WAYNE A. MACK, JR.

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6347

Counsel for Respondents

SUPPLEMENTAL BRIEF

(1)

Supreme Court, U.S.
FILED
JUL 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2013

In The

Supreme Court of the United States

October Term, 1987

The Board of Trustees of the State University of New York, et al.,

Petitioners,

v.

Todd Fox, Edward R. Detweiler, Stephanie Vaiano, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION PURSUANT TO RULE 22.6

HENRY T. REATH
(Counsel of Record)
WAYNE A. MACK, JR.

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-3428

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

The student respondents in the above matter are compelled to file this brief in response to the two amici curiae briefs filed on behalf of a number of state college and university organizations, as well as individual state colleges and universities.

While these are highly responsible and prestigious organizations and educational institutions, counsel on their behalf have raised legal arguments not raised by the petitioners, and have so misrepresented and distorted the record (without a single reference or other support for their contentions) and issues in this case that they must not be permitted to stand unanswered. Furthermore, the sham and erroneous arguments advanced raise serious questions as to the credibility of their briefs or the genuineness of the positions advanced, and said to be those of the organizations and institutions allegedly represented.[1]

No purpose would be served to address and respond seriatim to every point made in these briefs. In fact, all of their arguments have been fully met in the student respondents' brief in opposition to the petition for writ of certiorari filed by the State University of New York ("SUNY").

However, in the interest of fairness and essential justice, and to set the record straight, the student respondents file the instant brief to make the following principal points:

1. **This Case Does *Not* Involve the Right of a Commercial Seller of Goods or Services to Gain Uninvited Access to Public Property to Sell Its Wares.**

Both amici curiae briefs filed in support of petitioners proceed on the totally erroneous premise that this case seeks to establish the right of a commercial seller

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[1] See discussion below at page 9 concerning the false statements regarding the dormitory policy of the University of Michigan.

of goods and services to gain uninvited access to public property to sell its wares. It does not.

Rather, as made conclusively clear by the student respondents' principal brief filed on July 11, 1988, this is and always has been a *students' rights case*. The students challenge an arbitrary and draconian regulation, which both facially and as applied,[2] permits SUNY throughout its entire system to censor and bar outright any in-person communication in a student's private dormitory room between a student and any invitee, including *doctors, lawyers, tutors,* and *untold others,* who respond to a student's *bona fide invitation,* by giving information, advice,

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[2] Contrary to the assertion of the state college and university organizations in their brief at pages 7-8, note 2, the student respondents *have* challenged the broad nature of the SUNY regulation including the prohibition on students' rights to invite and communicate with *physicians, lawyers, tutors, stockbrokers* and *other professionals* in their rooms.

Initially, the student respondents challenged the regulation *as applied*. The students have professed a genuine desire to meet with *lawyers, doctors* and *other professionals* in their rooms, which SUNY admittedly prohibits. (See student respondents' principal brief at page 4). Thus, the students have standing to challenge the regulation. *See Steffel v. Thompson,* 415 U.S. 452, 459 (1974).

In addition, the student respondents have mounted a *facial* challenge to the SUNY regulation in that they have repeatedly argued to both the district court and the court of appeals that the regulation is *overbroad*. This challenge clearly meets the test set forth in *New York State Club Ass'n, Inc. v. City of New York,* 56 U.S.L.W. 4653 (U.S. June 20, 1988), where this Court stated that a facial challenge may be brought on the basis that there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the Court." *Id.* at 4656 (quoting *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801 (1984)).

or offering any product or service, if the invitee seeks to make a profit from such appearance.[3]

Counsel for amici curiae have, by innuendo and otherwise, improperly attempted to blunt the students' rights issues by placing irrelevant emphasis on the role of one commercial invitee, American Future Systems, Inc. ("AFS"), including such inappropriate and sarcastic references to it as the "pots and pans purveyor."

In the instant case, AFS, a commercial invitee, was named as a plaintiff, only because it sought to protect its interest (derivative, however, *only* through the student invitees), to respond to bona fide invitations to make presentations to a group of interested students.

It is true that the event which precipitated the instant action was the outrage of the students at the shabby way they and their invitee, AFS, were treated by campus police.[4] However, as the case unfolded, more and more students (all of whom were outstanding young people active in student government and student affairs),[5] sought and were granted the right to intervene as plaintiffs and carry the case forward as they saw and understood how their First Amendment rights as students were being abridged.[6]

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[3] See student respondents' principal brief at pages 4, 5.

[4] See the Second Circuit's opinion in this case at 841 F.2d at 1209 and Record at 19-23 describing how the campus police arrested, frisked and handcuffed Ms. Kathy Rapp, an AFS representative, who had been invited to a private dormitory room by a SUNY student.

[5] The student respondents include two *elected* presidents of student government, one *elected* vice president and a number of other *elected* student representatives.

[6] Todd Fox, a SUNY student, was named as plaintiff in the original Complaint filed in this action. Nine additional SUNY students were permitted to join as plaintiffs by the district court on April 15, 1984 and January 7, 1986. Numerous student organizations, including the Student

(Continued on following page)

At that point, and particularly after SUNY's trial counsel conceded that the truthfulness and lawfulness of the commercial speech was not in issue, AFS, as a commercial invitee, took a backseat role in the litigation. It did not even join or participate in the appeal below, other than to file, by separate counsel, a short amicus brief, which it has also filed before this Court.

Therefore, as the Second Circuit correctly recognized, but petitioners and amici refuse to acknowledge, this case does *not* involve "an effort by outsiders to gain access to university property; *rather it concerns only the constitutional rights of students in their dormitories.*" 841 F.2d at 1208 (emphasis added).

2. This Case Does *Not* Involve a Public or Non-Public Forum, but Students' Private Dormitory Rooms, and Their Rights to Invite to Their Space, Invitees of Their Own Choosing.

The amici curiae brief filed on behalf of the individual state colleges and universities posits its entire erudite, but totally irrelevant discussion of First Amendment "forum" law, on the false premise that this is a *public forum* case dealing with *time, place and manner* restrictions. It is not.

As for the *time, place and manner* argument, the student respondents' principal brief demonstrates the impropriety of utilizing that analysis in a case involving a *total ban* on a student's use of his or her *private room*. Indeed, SUNY has never even offered any alternative facilities where the students could receive and listen to

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Association of the State University of New York, Inc., the Student Association of the University at Albany, the University at Albany's Tenant Association and the Cortland College Student Association, supported the students' position as amici curiae before the Second Circuit Court of Appeals.

the speech of commercial invitees of their choosing,[7] nor contended that its regulation was anything less than what it was stated to be – a *flat out total prohibition* against the students using their *private dormitory rooms* for any communication with third parties that is tainted by any tinge of the profit motive.

As for the *public forum* contention, the amici briefs remarkably concede the absurdity of utilizing that analysis in this case. For example, the amici brief filed for the organizations labels the public forum analysis as an "unnecessary detour." *Id.* at 12. Similarly, the companion brief for the individual institutions concedes its understandable quandry as to what class of "public forum" a private dormitory falls into. *Id.* at 8. It then goes on to make the preposterous statement that "the question of whether a dormitory room is a public forum may vary from university to university depending on the degree to which the university 'has opened (it) for *use by the public* as a place for expressive activity.' " *Id.* (emphasis added). The concept that any student's private dormitory room (usually large enough to comfortably accommodate at most, a dozen or less persons, and at that, sitting on beds and on the floor), is a place for use by *the public* for expressive activity is absurd.[8]

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[7] This is a significant difference between this case and *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985) (*"Penn State"*). Unlike SUNY, Penn State permitted students to meet with third party invitees on a one-on-one basis in the student's room and to meet with third party invitees at an on-campus hotel. 752 F.2d at 868.

[8] The erroneous legal premise for the *forum argument*, as advanced by the amici brief for the individual state colleges and universities is shown by its lead reliance on this Court's recent decision in *Frisby v. Schultz*, 56 U.S.L.W. 4785 (U.S. June 27, 1988). As Justice O'Connor in the Court's opinion in *Frisby* perceptively pointed out: "The

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In short, a dormitory room, is not in any sense a public, quasi-public, or non-public forum.[9] It is a students' private home, his or her castle, so to speak. As such, its occupants, as citizens protected by the United States Constitution, are entitled to all the protections from arbitrary State actions that any other individual is entitled to.

3. This Case Does *Not* Involve Students' Rights to "Conduct", but to Speech Protected by the First Amendment.

The principal argument advanced in the amici brief of the state college and university organizations is that the SUNY regulation at issue in this case is subject to minimal scrutiny because it is merely directed to *conduct or activity*. It is not.

Amici's attempt to re-characterize the regulation in order to avoid or lessen the degree of First Amendment

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relevant forum here may be easily identified: appellees wish to picket on the *public streets* . . . Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the *archetype of a traditional public forum." Id.* at 4787 (emphasis added).

The Court further stated that its analysis was grounded in the protection of the *"unwilling listener," id.* at 4789, an issue which is obviously not present here where the speech is by invitation only and occurs in the private home of the student.

9 As the brief for the students before the Second Circuit pointed out, a forum is defined as:

> [T]he market place or public place of an ancient Roman city consisting of an open public place or square surrounded by shops or in later times by public buildings or ornamental structures (as colonnades) and forming the center of the judicial and public business.

Webster's Third New International Dictionary (1981).

scrutiny is totally contrary to SUNY's concession that *speech rights* are involved. At trial, SUNY stipulated that the regulation prohibits students from *communicating* with invitees which *furnish information* or provide a product or service with the intent to make a profit. Indeed, SUNY itself does not now advance the conduct/non-speech contention, nor did it do so in the district court or the court of appeals. Consequently, this Court should not consider it now.[10]

Furthermore, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court specifically rejected the argument advanced for the first time in the litigation by amici. There the Court held that a regulation limiting contributions to political campaigns involved an infringement on *speech*, not conduct:

> We cannot share the view that the present Act's contribution and expenditure limitations are comparable to a restriction on conduct . . . The expenditure of money simply cannot be equated with such conduct as destruction of a draft card . . . *[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment.*

Id. at 16 (emphasis added).[11]

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10 Since petitioners never made and do not now make such a contention, it is not a proper subject for this Court's review. *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

11 Likewise, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court stated as follows:

> It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another . . . Speech likewise is protected even though it is carried in a form that is "sold" for profit, . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.

Id. at 761 (citations omitted).

Clearly, a regulation such as that at issue here, which prohibits students from receiving information and communicating with their invitees in their private rooms, is subject to First Amendment scrutiny as an infringement on speech. This case is a far cry from a case involving a regulation prohibiting the destruction of a draft card, *e.g., United States v. O'Brien*, 391 U.S. 637 (1968), or controlling camping in public parks, *e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Accordingly, amici's attempt to shield the SUNY regulation from First Amendment scrutiny in a manner not even attempted by petitioners themselves must be rejected.

4. The Alleged Conflict Between the Second and Third Circuits Is Illusory, Does Not Exist, and Does Not Warrant Intervention by This Court.

The two amici briefs' contention of an alleged conflict between the Second Circuit and the Third Circuit, as demonstrated in the student respondents' brief in opposition, is illusory.

Not only are there factual differences between the cases, but this Court's intervening decisions, discussed at pages 28-29 in the student respondents' principal brief, including the Court's recent decision in *Shapero v. Kentucky Bar Ass'n*, 56 U.S.L.W. 4532 (U.S. June 13, 1988), conclusively resolve any uncertainty as to the correct application of the commercial speech test. In fact, in *Shapero* this Court resolved the very issue involved here holding that a blanket prohibition on commercial speech was not permissible in the face of *"less restrictive and more precise means." Id.* at 4534 (emphasis added).

5. Counsel For The Individual College and University Amici Has Misstated the Campus Policy of at Least One Institution.

Finally, the student respondents cannot let go unchallenged, the irresponsibly false statement by counsel in the amici brief for the individual state colleges and universities that "the amici limit or bar commercial activities in student's dormitory rooms by means of rules

similar to the State University of New York (SUNY) regulations at issue in this case." *Id.* at 2.

While time does not permit extensive research comparing the dormitory regulations of each of the individual state colleges and universities joining in that amici brief, it is an undisputed fact that one of the universities, the University of Michigan, has no such policy as represented above.[12]

Furthermore, considering the unrebutted evidence presented at trial, and the unchallenged statement below that the SUNY policy of a flat ban runs counter to the mainstream of universities and colleges throughout the United States,[13] there is a serious question as to whether the above statement is true for all of the other amici on whose behalf that brief is filed.

In this regard, it should by of way summation, be stressed again, that the student respondents in this case do not now, and never have (nor to counsel's knowledge have any of the commercial invitees responding to students' invitations) contended that itinerant peddlers should have the freedom to trespass or gain forced access into residence halls to randomly knock on doors to disturb the peace and privacy of students in their rooms.

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[12] The University of Michigan's policy is vastly different from the SUNY draconian policy, specifically permitting the very kind of student invited commercial speech which under the SUNY regulation is prohibited:

> Solicitors may make or solicit sales in the halls only upon invitation of a resident student and only in that student's room . . . *An individual student may invite a commercial seller to his/her residence hall room in order for the seller to disseminate information concerning its products to a group of other invited students.*

[13] See Reply Brief filed by the students in the Second Circuit Court of Appeals at 3.

To the contrary, the student respondents in the instant case have consistently contended that there are far less restrictive regulations that would fully advance the legitimate concerns of the university; – and that is to do, as the mainstream of colleges and universities throughout the country do – ban itinerant peddlers from randomly knocking uninvited on doors of private dormitory rooms, *but permit students to invite commercial and professional guests to their private rooms.*

Thus, the mainstream of colleges and universities, consistent with appropriate health and safety regulations applicable to all other visitors, wisely let the students be the judge of who they wish to have visit them in the privacy of their dormitory rooms, and the subjects they wish to discuss.

The student respondents in this case only request that they be permitted to exercise these same constitutional rights.

CONCLUSION

For the foregoing reasons and those developed in respondents' brief in opposition, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

HENRY T. REATH
(Counsel of Record)
WAYNE A. MACK, JR.
DUANE, MORRIS &
HECKSCHER
1500 One Franklin Plaza
Philadelphia, Pa 19102
(215) 854-6347

Counsel for Respondents

REPLY

BRIEF

Supreme Court, U.S.
F I L E D
AUG 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2013

IN THE

Supreme Court of the United States

October Term, 1987

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General
of Counsel

Dated: July 26, 1988

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No. 87-2013

IN THE

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TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF.

I

The commercial speech cases relied on by respondents are distinguishable from the case at bar and support petitioners' argument.

In their brief in opposition to the petition, respondents contend (Br., pp. 16-18, 28-29) that four cases decided by this Court compel the conclusion that this Court has already spoken, in a fashion adverse to petitioners, on how the fourth prong of the commercial-speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), must be applied to the present case. Three of these four cases, however, arose in the context of blanket bans on attorney advertising, rather than restrictions on the place and manner of commercial speech, and are entirely distinguishable from the case at bar. The fourth case identified by respondents is in fact the case that demonstrates the incorrectness of their argument.

In *In re R.M.J.*, 455 U.S. 191, 203 (1982), this Court invalidated what it called "an absolute prohibition [by the State of Missouri] on certain types of potentially misleading information" in attorney advertisements. The record was "silent" as to the state's justifications for the ban. 455 U.S. at 206. Surmising that the state's inability to oversee such advertising for possible deceptiveness was the reason for the ban, the Court refused to find "that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception." 455 U.S. at 206-207. In other words, the possibility that some attorney advertising might be deceptive or misleading and difficult to regulate did not entitle the state to outlaw truthful advertising as well.

Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court invalidated what it repeatedly characterized as Ohio's "prophylactic rule" or "blanket ban" prohibiting certain content in attorney advertisements, 471 U.S. at 643, 644, 648, 649. The state argued that its rule was necessary to obviate "the problem of distinguishing deceptive [from] nondeceptive legal advertising" or that of "identifying deceptive or manipulative uses of visual media in advertising." 471 U.S. at 646, 649. This Court held that the purported difficulty of distinguishing truthful and nondeceptive advertising from false and deceptive advertising did not justify a prophylactic rule banning *all* advertising, truthful or deceptive, with a given content.

Most recently, in *Shapero v. Kentucky Bar Association*, 56 USLW 4532 (June 13, 1988), this Court again dealt with a "blanket ban" on targeted, direct-mail solicitation by attorneys. *Id.* at 4534. Again, the state argued that a prophylactic rule was necessary because such solicitation was immune to effective state oversight and thus had a heightened potential for deception and abuse. As in *R.M.J.* and *Zauderer*, the Court rejected this argument, finding that the asserted capacity for abuse did not justify a total ban on attorney advertising.

Thus, the factual pattern in the three cases relied on by respondents is virtually identical: a state, concerned about deceptive attorney advertising, imposes a total, prophylactic ban on the content of such advertising. This Court then responds by noting that the state's concern can be vindicated by means short of a blanket ban.

At no point do these cases resemble the factual setting of the present case. First, the SUNY regulation is not a blanket ban, despite respondents' efforts to characterize it

as such. SUNY makes no attempt to forbid all commercial speech on campus, or to regulate students' in-person interaction with commercial speakers off campus. This is far different from a "blanket" prohibition of speech of a certain content at all times and in all places.

Secondly, the state interest asserted is not primarily that of the need to control deceptive advertising or speech, and the desire to avoid the trouble of distinguishing truthful from false advertising on a case-by-case basis. Such a purpose, the attorney-advertising cases indicate, is impermissible as a basis for a blanket ban. Rather, the SUNY regulation vindicates two other substantial state interests: the need to preserve the educational atmosphere of SUNY campuses, and the need for campus safety and security at the lowest cost. The commercial presence on campus that would result from even the case-by-case scrutiny of purported commercial "invitees" urged by respondents would, the record indicates, be intolerable.[1] And the cost of implementing the security system necessary for such scrutiny would be prohibitive. In other words, unlike the circumstances in the attorney-advertising cases, the problems which the SUNY regulation aims to cure would remain even with the supposedly "less restrictive" approach urged by respondents. Like the ordi-

[1]The SUNY regulation protects the educational environment of SUNY campuses not from commercial *speech* but from incompatible commercial *conduct*. The speech involved is merely part of the commercial activity SUNY seeks to regulate. Because SUNY's restriction applies to "regulable conduct," and has "only an incidental impact on speech," *Clark v. Committee for Creative Non-Violence*, 468 U.S. 288, 298, 298 n. 7 (1984), petitioners commend to the Court the approach set forth in the brief of *amici curiae* American Council of Education, American Association of State Colleges and Universities, National Association of State Universities and Land Grant Colleges, and National Association of Student Personnel Administrators, suggesting that the SUNY regulation is a valid restriction on conduct. *See Clark*, 468 U.S. at 298-99 (regulation sustainable whether viewed as restriction on speech or on conduct).

nance prohibiting the posting of signs on public property in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the regulation is valid because it "responds precisely to the substantive problem which legitimately concerns" the state. The prophylactic bans in the attorney-advertising cases, by contrast, swept too broadly to do so. These cases in no way compel the Second Circuit's holding in the present case.

The fourth commercial speech case relied upon by respondents, *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968 (1986), instead supports petitioners' argument. Respondents (Br., p. 18) correctly characterize this Court's decision as deferring to the Puerto Rico legislature's assessment that the promulgation by casinos of additional speech "would not be effective as a less restrictive alternative" means of discouraging gambling in lieu of the blanket prohibition on advertising approved by the legislature. 106 S.Ct. at 2978. As noted in the petition, such "counterspeech" is obviously "less restrictive" than a total ban on advertising, yet Puerto Rico need not have resorted to it in order to comply with *Central Hudson*. SUNY's conclusion that its regulation is a more effective means of preserving the educational atmosphere on its campuses and maintaining low-cost campus security than the "less restrictive" measures proposed by plaintiffs merits the same deference this Court showed in *Posadas*,[2] with which the opinion below is in clear conflict.

[2]Respondents (Br., p. 18) incorrectly characterize a Fifth Circuit opinion quoted approvingly by this Court in *Posadas* as ruling that the promulgation of additional speech was not a "less restrictive alternative". As the quotation in *Posadas* makes clear, *Dunagin v. City of Oxford*, 718 F.2d 738, 757 (5th. Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), held that a "less restrictive" program of counterspeech would be ineffective in lieu of a ban on liquor advertising. *See Posadas*, 106 S.Ct. at 2978.

II.

The SUNY regulation is a time, place and manner restriction.

As suggested by the preceding discussion, the SUNY regulation is properly characterized, not as a "blanket ban" or a "prophylactic rule", but as a restriction on the time, place, and manner of speech. Presumably recognizing that it passes muster as such, respondents devote considerable space to the contention that the time, place and manner standards do not apply. Their efforts are uniformly mistaken.

First of all, it is plain that the SUNY regulation *does* involve the time, place and manner of speech. Respondents wrongly characterize it (Br., p. 12) as "an absolute ban" on speech. But there is nothing absolute about it. The regulation simply prohibits one *manner* of speech (in-person commercial solicitation) in one *place* (university campuses). It thus resembles the prohibition upheld as a time, place and manner restriction in *Heffron v. International Society for Krislina Consciousness, Inc.*, 452 U.S. 640 (1981). In *Heffron*, this Court approved a requirement that religious organizations soliciting donations at a state fair do so at booths in assigned locations at a state fairgrounds. Like the SUNY regulation, the restriction in *Heffron* prohibited the *manner* of speech (in-person solicitation) and its *place* (elsewhere than booths on the fairgrounds). The regulation was an "absolute", "blanket ban" only in the insignificant sense that all solicitation in a particular manner at a particular place was prohibited.

Obviously, any restriction on speech is "absolute" once it is categorized narrowly enough.[3]

Respondents also attempt to impose on time, place and manner analysis a set of limits to its applicability expressly repudiated by this Court. Thus, they repeatedly assert (Br., pp. 15, 26) that time, place and manner analysis is "corollary" to the public forum approach applicable to public property. Although, as this Court has noted, time, place or manner restrictions may be placed on the use of public property, *see Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983), they may apply to private property as well. Thus, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), upheld as a time, place and manner restriction a city zoning ordinance prohibiting adult movie theatres on private property in certain locations. If time, place and manner analysis applies only "to cases involving a third party's right of forced access to government property" (Br., p. 26), *Renton* could not have been decided as it was. The assertedly "private" nature of state-owned SUNY dormitories thus does not render time, place and manner analysis less applicable.

---

[3]The same analysis exposes as a sham respondents' contention (Br., p. 23, n. 16) that the regulation is not "content-neutral" because it is directed at one form of speech only. *Any* less-than-absolute prohibition on speech is "content-based" in this insignificant sense. Like the restriction in *Heffron*, SUNY's regulation is content-neutral because "it applies evenhandedly to all who wish to" engage in commercial transactions on SUNY campuses, 453 U.S. at 649. *See also, Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) ("As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place and manner of advertising"); *cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion) (city may choose to ban one type of commercial speech but permit another).

As noted in petitioners' main brief (pp. 19-22), the SUNY regulation is plainly a valid time, place and manner restriction. It is content-neutral, it is narrowly tailored to serve a legitimate government interest, and it leaves open ample alternative channels for communication. *See Clark, supra,* 468 U.S. at 293. Respondents create only spurious barriers to the application of these standards, which should have been but were not applied by the court below.

CONCLUSION.

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: Albany, New York
July 26, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners

O. PETER SHERWOOD
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUL 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2013

In The

Supreme Court of the United States

October Term, 1987

The Board of Trustees of the State University of New York, et al.,

Petitioners,

v.

Todd Fox, Edward R. Detweiler, Stephanie Vaiano, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN FUTURE SYSTEMS, INC.

MICHAEL GRIFFINGER
(Counsel of Record)

CRUMMY, DEL DEO, DOLAN, GRIFFINGER AND VECCHIONE
One Gateway Center
Newark, NJ 07102
(201) 622-2235

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Amicus curiae American Future Systems, Inc. ("AFS")[1] is a small Pennsylvania corporation with its principal place of business in Bryn Mawr, Pennsylvania. It specializes in selling, *by designated invitation only*, high quality cookware, table china, and tableware to young people enrolled at colleges, universities and other institutions of higher learning throughout the country.

This Amicus brief is filed for the *sole* purpose of bringing to this Court's attention certain information regarding the high ethical standards of AFS's selling practices and the well deserved reputation for integrity which AFS has among the students at the schools and colleges where it sells its products.[2]

In a somewhat similar case in the Court of Appeals for the Third Circuit, AFS was a plaintiff below and

---

1 AFS was originally a party to the instant action when it and several student plaintiffs sought and received from the district court a preliminary injunction permitting AFS to come on certain of the SUNY campuses as the invitee of a designated student to that student's private room to furnish valuable information, present a demonstration of nutritional cooking, and to solicit offers to purchase its products and services.

AFS was not a party to the appeal to the Second Circuit Court of Appeals although as one of a number of invited persons who are prevented from responding to invitations from students, it has an indirect and derivative interest through the inviting students in the outcome of this case.

2 Petitioners and respondents have consented to the filing of this Amicus brief.

participated, as an appellee, in an appeal taken by Pennsylvania State University, from the grant of a final injunction in favor of the student plaintiffs and AFS. This judgment was subsequently reversed by the Third Circuit. *See American Future Systems, Inc. v. The Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985).

In the concurring opinion of District Judge Sarokin in the Third Circuit case, there are some very unfair, unsubstantiated, and untrue charges (that were not found by the court below, or accepted by the other members of the panel) that tended to impugn AFS's selling practices and its business reputation. As a result, AFS undertook to protect its business reputation and secured the independent services of three nationally known and respected university educators to conduct an Ethics Audit of all its selling practices.

AFS wishes to bring the results of that audit to this Court's attention.

Attached as an appendix to this brief is a copy of that Ethics Audit, in which the auditors concluded:

> It is the opinion of the Ethics Audit Committee that American Future Systems, Inc., represents a traditional American spirit of entrepreneurial endeavor, and that it conducts its business in a responsible and ethical manner. The Auditors note that many fine colleges and universities . . . have developed reasonable campus policies that protect their students and the right of AFS to engage in a worthwhile business enterprise.

Id. at 7.

Respectfully submitted,

MICHAEL GRIFFINGER, ESQUIRE
(Counsel of Record)

Crummy, Del Deo, Dolan,
Griffinger and Vecchione
One Gateway Center
Newark, NJ 07102
(201) 622-2235

APPENDIX

THE ETHICS AUDIT OF

AMERICAN FUTURE SYSTEMS, INC.:

An External Study of Its Business/Sales Practices

–George W. Johnson, Ph.D., President
George Mason University, Fairfax, Va.

–Phyllis Lachs, Ph.D., College Counsel
Bryn Mawr College, Bryn Mawr, Pa.

–Marvin Wachman, Ph.D., Chancellor
Temple University, Philadelphia, Pa.

July 1, 1985

THE ETHICS AUDIT OF AMERICAN FUTURE SYSTEMS, INC.:

An External Study Of Its Business/Sales Practices

1. Introduction

American Future Systems, Inc., is a private, market-driven firm based in Bryn Mawr, Pennsylvania. Founded in the early 1960's, AFS specializes in the sale of high-quality china, crystal, tableware and cookware to a broad range of consumers through the technique of in-the-home demonstrations. Its largest division, American Prestige Series, caters to the college market – primarily women between 18 and 22, although young men occasionally purchase the products as well.

The company is active on some 1,000 private and public college and university campuses throughout the nation. The vast majority of its marketing effort, however, is directed at larger institutions of higher learning, where the higher number of students makes for greater market penetration. Sales visits are made by invitation only in the privacy of a college dormitory room or apartment, and off-campus apartment or home.

Access to the campus is essential to the firm's carrying out its function.

AFS has traditionally gained admittance to campus by inviting a student to host a demonstration in the privacy of her dorm room. This student, in turn, contacts a number of friends to attend the event. The initial contact with the host student is made through a personal telephone solicitation from either the home office in Bryn Mawr or the local representative. AFS does not engage in selling door-to-door in college dormitories. Visits to the

dormitory rooms by AFS representatives are always made by this arranged invitation.

2. Why Conduct an Ethics Audit of AFS?

For a number of years AFS has successfully served thousands of students. On many campuses the business activity was done with the knowledge of college officials consistent with their regulations.

Still, there were some college officials who concluded that any commercial activity, no matter how well intended and run, was an interference with the purposes of the institution. Some colleges imposed restrictions. AFS sought remedy in the courts to allow access to students on those campuses with restrictions. This resulted in many court opinions over a seven year period. The litigation process still continues and is not fully resolved.

The company received a favorable opinion in Federal District Court in a case involving Pennsylvania State University. When the university appealed the decision, the Third Circuit Court of Appeals, in its published opinion, reproved AFS for some of its practices.

The company believes that the language of the court of appeals unfairly damages its reputation and that these characterizations, if left unchallenged and unanswered, will seriously harm the perception of AFS as a legitimate enterprise among students, faculty and campus administrators.

The President of AFS, Mr. Edward Satell, therefore took the unusual step of inviting an impartial panel of

representatives from higher education to visit his company, examine in depth his business/sales practices, and to assay objectively AFS's ethical standards.

Mr. Satell guaranteed total cooperation in sharing all records, documents and evidence concerning AFS and its methods of business. He further guaranteed the panel's freedom to prepare its report uninfluenced by AFS.

The following persons, none of whom had previous contact or association with the company, agreed to become members of the Ethics Audit Committe:

–George W. Johnson, Ph.D., President of George Mason University, Fairfax, Va.

–Phyllis Lachs, Ph.D., J.D., College Counsel, Bryn Mawr College, Bryn Mawr, Pa.

–Marvin Wachman, Ph.D., Chancellor, Temple University, Philadelphia, Pa.

The three panel members represented, respectively, a state university of 16,000 students, a private liberal arts college of about 1,800 students and a state-related university with nearly 31,000 students.

The Ethics Audit Committee was asked to consider the following question: does American Future Systems, Inc., deal fairly, openly and ethically with the consumers on the college campuses?

3. The Plan Of The Ethics Audit

The ethics auditors accepted the invitation of AFS with the following conditions: 1) that there would be no restraints upon the investigation; 2) that all necessary

information would be provided, and 3) that all resource people would be available to the members.

Panel members also agreed that questions of law would not be considered, and that they would not make judgments on the several court cases brought by AFS and the appellants. Finally, the members decided to limit the audit to the American Prestige Series, that part of the company's business centered on the various campuses.

AFS agreed unequivocally to these conditions.

Two weeks before the first meeting of the ethics auditors, AFS distributed certain court opinions, partial transcripts of hearings and copies of company literature – sample contracts, advertising, booking policies and other materials related to the business routines.

On March 17, 1985, the panel met at AFS headquarters in Bryn Mawr. The ethics auditors interviewed Mr. Satell, AFS counsel Henry Reath, and a number of company employees, including the manager of sales promotion, the regional sales manager, the senior manager of the group that solicits student hosts and the senior manager of the firm's department that takes follow-up orders from customers.

Mr. Satell made himself available to answer all questions. The panel also screened a video tape of an actual sales presentation and an audio recording of a typical "booking" request to a student host. At the conclusion of this day-long session, the ethics auditors requested and subsequently received additional information about AFS and the court hearings.

After reviewing the materials for two weeks, the Audit Committee met for a second time on Monday, April 1, at AFS. At the auditors' request, Mr. Satell again spent considerable time with them. The group then devoted the major portion of the day to discussing the issues among themselves. During this session, the panel decided to send a representative to Pennsylvania State University to speak with officials there about the AFS case. One of the auditors contacted a high official at Penn State and asked to visit the campus and inquire firsthand about the University's dealings with AFS. Penn State officials, perhaps because of pending litigation with AFS, elected not to meet with the panel representative.

4. Findings Of The Ethics Audit Committee

After reviewing the business/sales practices and operation of American Future Systems, Inc., in considerable detail, the committee found that:

1. The AFS contract for its American Prestige Series is written in clear, unambiguous language. It specifically refers to opportunities for cancellation and exchange, and explains the limitations of these opportunities and the steps students must take to fulfill the contract.

2. The company's sales presentations are carefully scripted and controlled, and are not misleading.

3. The company uses a premium (vacations) as an inducement for the campus hostesses. It does not misstate or misrepresent the terms of the premium.

4. In the event of a dispute between the company and a student buyer, AFS is committed to binding arbitration with the Better Business Bureau or with a college ombudsman.

5. The company has demonstrated flexibility and sensitivity to ethical questions in working out problems in the past, to protect both the consumer and the firm.

6. AFS has shown willingness to modify its practices in order to deal fairly with its customers. To the extent that the court found misleading policies – however inadvertant – AFS moved quickly to change them. For example, the company corrected its mistake in interpreting federal law relating to the extension of credit to minority students. The company now conforms to the requirements of the Equal Credit Opportunity Act.

7. For reasons both altruistic and self-serving, AFS has maintained expansive credit policies, and takes pride in its claim that it is special, extending credit, in the words of the amended District Court order, "to young people who would otherwise be unable to obtain credit in the traditional marketplace."

8. The company makes an extensive effort to communicate and gain constructive feedback from the students through the use of questionnaires from the "hostesses" after their purchase.

5. Conclusion

The Ethics Audit Committee recognizes that the business community and the academic world represent different, sometimes opposing, viewpoints. In spite of the

decline of the doctrine of in loco parentis, colleges and universities are understandably protective of the privacy and security of their students. They also are wary of entrepreneurs who use the campus environment as a base to make money. At the same time, a college education is supposed to foster a healthy skepticism, which often can conflict with the optimistic promises of an entrepreneur.

On the other hand, no reputable businessman should feel defensive about making a profit and generating employment opportunities through the ethical delivery of a product or service to college consumers.

It is the opinion of the Ethics Audit Committee that American Future Systems, Inc., represents a traditional American spirit of entrepreneurial endeavor, and that it conducts its business in a responsible and ethical manner. The auditors note that many fine colleges and universities have bridged the "two cultures" and have developed reasonable campus policies that protect their students and the right of AFS to engage in a worthwhile business enterprise.

Finally, the auditors wish to make clear that this audit in no way endorses AFS's products, although information gained during the review suggests they are of good quality.

/s/ George W. Johnson
/s/ Phillis Lachs
/s/ Marvin Wachman

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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No. 87-2013

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

v.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS IN SUPPORT OF PETITIONERS

Of Counsel:
SHELDON E. STEINBACH
General Counsel
AMERICAN COUNCIL ON EDUCATION
Suite 800
One Dupont Circle, N.W.
Washington, D.C. 20036

RICHARD D. MARKS *
MICHAEL B. GOLDSTEIN
JANE B. BULBIN
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The federal question presented in this case, the appropriate constitutional analysis of attempts to use college dormitories for commercial purposes, is a matter of surpassing and continuing importance to the *thousands* of colleges and universities across the United States which the *amici curiae* represent. The *amici* appear in this case because the Court of Appeals misapplied the law in reaching its decision below. If allowed to stand, the

decision will impair the ability of public institutions of higher education throughout the United States to manage their student housing facilities properly, and to carry out their obligations to protect the physical and mental well-being of their students and enhance their intellectual development.

Collectively, the member institutions of the *amici curiae*, the American Council on Education ("ACE"), the American Association of State Colleges and Universities ("AASCU"), the National Association of State Universities and Land Grant Colleges ("NASULGC"), and the National Association of Student Personnel Administrators ("NASPA"), are responsible for ensuring the safe, efficient and educationally productive management of hundreds of thousands of student housing units.

ACE was founded in 1918 and serves as the national association of all sectors of American higher education. Its membership consists of approximately 1,500 institutions, and includes a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of American higher education, including supporting the interests of all component groups of the academic community: students, faculty, administration, the public sector, and the nation of which all are a part. In matters of public policy, ACE commonly serves as the "umbrella" organization for the interests of higher education.

AASCU was founded in 1961, the outgrowth of a predecessor association of state colleges and teacher training institutions. Its 373 member institutions and 30 state university systems constitute a substantial majority of public senior colleges and universities. AASCU-member institutions enroll approximately 2,600,000 students, of which approximately sixty percent (60%), or 1,560,000, live in college or university-controlled housing.

NASULGC traces its origins to the year 1871. The organization's 128 member institutions are the designated

Land Grant universities in each of the states, as well as the "flagship" state universities and other large public universities. NASULGC-member institutions enroll approximately 2.7 million students, of whom sixty percent (60%) live in university dormitories or other university-owned housing.

NASPA, founded in 1919, is the national association of university administrators responsible for student affairs. The primary purpose of NASPA is to assist members in fostering the maximum personal development of students as members of society. To accomplish this purpose, the organization conducts an extensive program of research, training and development, as well as publication in the field of student affairs, including substantial work concerning the proper administration of institutional housing facilities. Over 3,600 individuals and 1,100 colleges and universities are members of the Association.

It is the view of the *amici curiae* that college dormitories are more than places to house students. They are an integral part of the educational environment of the institution. The dormitory is a center for learning and for developing social skills, as well as an abode. For the vast majority of students attending public colleges and universities, the dormitory also is the first residence outside the family home. The institution therefore must administer housing carefully, to assure that the residential environment the school provides will appropriately serve these individuals.

The administration of a dormitory generally is a task substantially more complex than that of managing a commercial residence. College administrators must constantly strike a delicate balance between the rights and interests of each student, and those of his or her neighbors.

The present case raises serious issues regarding the ability of college authorities to execute their educational

and managerial responsibilities properly. The *amici curiae* are deeply concerned that the substantially different decisions reached by the Courts of Appeals for the Second and Third Circuits may create confusion among those charged with the management of student housing, and may result in the inadvertent impairment of the rights both of dormitory residents and institutions. The implications of this divergence in the law become increasingly significant due to the fact that many of the commercial entities which seek to take advantage of student dormitories as a site for their sales activities are national in nature. They have demonstrated a marked tendency to attempt to persuade campus officials of their unbridled right of access by providing excerpts from judicial decisions, often from a jurisdiction other than that in which the institution is located. Where the Circuits are split, the mischief that could arise from such conduct, even if unintended, is manifest, making even more critical the establishment of a uniform legal standard. For these reasons, ACE, AASCU, NASULGC and NASPA appear in support of Petitioners and respectfully urge the Court to grant the Petition for Certiorari.

SUMMARY OF ARGUMENT

Opinions of this Court distinguish clearly between (1) regulation of conduct and speech incident to that conduct, *e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and (2) direct regulation of commercial speech standing alone, *e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

This case concerns the regulation of commercial conduct on campuses of the State University of New York ("SUNY"). To further the substantial interests of health, safety and welfare of the students, as well as the primary

educational mission of the institution, SUNY bans most commercial activity on the University's campuses. Because the ban is reasonable, seeks to further substantial interests of the University community, and is a regulation of conduct with an incidental impact on commercial speech, the regulation is valid and should have been upheld. The Court of Appeals therefore erred in holding SUNY's regulation an unconstitutional infringement on the First Amendment rights of certain students who sought to host sales sessions in their rooms.

The Court of Appeals overlooked the fact that SUNY's ban restricts *conduct* and only incidentally restricts speech; incorrectly viewed the regulation as an impermissible limitation on commercial speech; and analyzed this case under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than under *O'Brien* and *Clark*. Its decision conflicts with applicable decisions of this Court and creates an important new question of federal law that should be settled by this Court.

The Second Circuit's reliance on *Central Hudson*, itself an error, is compounded by the court's misapplication of the "no more extensive than necessary" criterion of the *Central Hudson* test. Instead of holding SUNY to a least restrictive means standard, the Second Circuit should have followed the Third Circuit's analysis of the *Central Hudson* test in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), a case on essentially the same matter, and deferred to SUNY's judgment in adopting a regulation properly tailored to protect the substantial institutional interests at stake. Instead, the Second Circuit misinterpreted *Central Hudson* by misreading *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), creating a conflict between circuits.

ARGUMENT

I. The Opinion Below Applies The Wrong Legal Test To A Prohibition On Certain Commercial Activities, In Conflict With The Decisions Of This Court

This case is about state university students' claims of right to invite vendors into their dormitory rooms to sell china and cookware to them and to other students gathered there. The students and the Court of Appeals view the university's ban on such sales as denying students the right to receive information. 11a-13a.[1] *Amici*, in contrast, support SUNY's view, on the ground that the ban is a reasonable restriction on commercial activity accompanied by an incidental restriction on speech that is wholly justified under *United States v. O'Brien*, 391 U.S. 367 (1968), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

With the limited exception of certain specified services necessary for the day-to-day needs of the campus community, SUNY bans commercial enterprises from operating on its campuses. 6a. This ban extends to vendors invited by students to use their dormitory rooms for commercial enterprises. *Id.* SUNY's aim is to preserve the dormitories' educational environment, assure students' safety and prevent their commercial exploitation, and avoid the use of these tax-supported residence halls for commercial purposes. The Court of Appeals concedes that these interests are substantial. 14a-15a; *Cf. Frisby v. Schultz*, 56 U.S.L.W. 4785 (U.S. June 27, 1988). Certain SUNY students challenge this regulation on First Amendment grounds and the Court of Appeals, applying *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), remanded for

[1] All numerical references followed by "a" or "b" refer to pages of the petitioners' appendix.

trial to determine whether a less restrictive means exists to further the state's goals. 15a-16a.

The Court of Appeals confused the various ways in which commercial activity and commercial speech interrelate, and the different tests this Court has prescribed to regulate one or the other. Further, a decision of the Third Circuit, dealing with essentially the same facts but upholding a similar campus ban, also focused primarily on regulation of commercial speech under *Central Hudson*. *American Future Systems v. Pennsylvania State University*, 752 F. 2d 854 (3d Cir. 1984) (*Central Hudson* test applied and university's restrictions upheld; demonstration of less restrictive means specifically not required under *Central Hudson's* "no more extensive than necessary" criterion).

Amici believe that this Court's developing doctrine in commercial speech cases, combined with the fact that commercial speech necessarily is involved in the sales of china and cookware at issue here, distracted the courts both below and in *American Future Systems*. Commercial speech certainly is present in the dormitory room sales pitches made by American Future Systems ("AFS") representatives, but that is only one starting point for First Amendment analysis under decisions of this Court. Under *O'Brien* and *Clark*, the initial questions are whether the state has a reasonable basis for regulating the activity in question, and whether the challenged government action is aimed at suppressing particular expression or points of view.

No one should doubt that the supposedly protected activity here is the marketing of china and cookware to college students in the commercially very convenient sales setting of dormitory rooms.[2] This case therefore does

[2] Respondents argued in their brief below that "[t]he prohibited communications involve a wide range . . . from legal advice and/or medical advice about birth control, to information concerning nutri-

not involve on-campus solicitations by political or evangelical groups, *see Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985) (upholding policy banning campus solicitations in face of challenge by non-student members of Socialist Workers Party); *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984) (upholding, under *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), state university prohibition against door-to-door solicitation in university dormitories in face of challenge by student seeking to encourage attendance at bible discussions). It does not involve activity undertaken as symbolic speech, *see, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966) (protecting silent demonstration in public library).

Rather, this case returns us to a distinction between government regulation of commercial activity (of which speech is a necessary part) and government regulation aimed at commercial speech itself. The commercial activity in this case, selling china in dormitory rooms, is not inescapably intertwined with historical notions of free speech. *Compare Martin v. Struthers*, 319 U.S. 141 (1943) (ordinance forbidding Jehovah's Witness from distributing religious literature door-to-door held unconstitutional), *with Breard v. Alexandria*, 341 U.S. 622 (1951) (ordinance forbidding door-to-door sale of goods held constitutional). Moreover, the speech associated with

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tional cooking and cookware." Brief of Plaintiffs-Appellants at 12. However, Respondents do not mount a facial challenge to SUNY's regulation. If they did so, their position could not be sustained and the case would be dismissed, because a valid constitutional application of the regulation is easily conceivable and no claim was made that the regulation is so overbroad as significantly to compromise First Amendment rights of nonparties. *See New York State Club Association, Inc. v. City of New York*, 56 U.S.L.W. 4653, 4656-57 (U.S. June 20, 1988). Consequently, the case concerns only SUNY's regulation *as applied* to the sales activities of American Future Systems, described at 3a-4a and 6a-7a of the Court of Appeals' opinion.

AFS's attempts at dormitory room sales is unquestionably commercial speech as a matter of law under *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983); *see also American Future Systems*, 752 F.2d at 862.

Viewed as banning the sale of goods in dormitory rooms, with an incidental effect on commercial speech in that special setting, the SUNY regulation should be analyzed under *O'Brien* and *Clark*, because its focus is on conduct. For the same reason, *Central Hudson* is not the best test. The Public Service Commission policy statement at issue in *Central Hudson* prohibited electric utilities from advertising to stimulate the purchase of utility services. Its focus was on preventing speech with a particular content, extolling use of electricity. It did not seek to ban sale of electricity in particular places. 447 U.S. at 559-60. The governmental action was aimed directly at suppressing commercial speech because of its content.

SUNY's regulation does not seek to prohibit the dissemination of information about AFS's products or to discourage the purchase of its goods at places off-campus, where commercial sales activity is appropriate. Students may also receive that information in their dormitories by mail or telephone, or attend an AFS demonstration off-campus. SUNY seeks only to preserve the educational purpose and character of its dormitories and minimize intrusions on the privacy of residents, and consequently forbids use of the dormitories by anybody for any commercial sales (other than those basic items, such as laundry and beverage service, excepted in the regulation). This is analogous to the town of Brookfield's action in *Frisby*, banning picketing on public streets "before or about" any residence for the purpose of preserving the tranquility of the home, 56 U.S.L.W. at 4787. SUNY's ban similarly preserves the tranquility of dormitory rooms near rooms where AFS solicitation meetings would

otherwise take place. Moreover, *Frisby* concerned core political speech protesting abortion, not commercial sales pitches for cookware. Consequently, the prohibition against picketing upheld in *Frisby*—recognizing *the state's right to adopt measures assuring the peacefulness of residences*—is a far greater and more direct imposition on traditional free speech rights than SUNY's incidental regulation here.

This analysis also wholly undercuts any notion to which the Court of Appeals alluded, 13a, that students' privacy rights in their rooms justify invalidating the ban on private commercial activity in the dormitories. Rather, the issue is whether the state's interest in preserving the educational purpose and safety of multi-unit student residences is substantial.

What is at stake in the present case is not the privacy rights of SUNY students who seek to host AFS demonstrations in their rooms (in return for consideration in the form of Florida hotel accommodations). Rather, as in *O'Brien*, *Clark*, and *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the regulation is directed at the problems which SUNY administrators knew from broad experience in the field occurred on campuses where commercial solicitation was permitted. The ban on commercial activity on campus was designed to reduce the incidence of criminal activity and security problems, and to assure the academic and social environment which the schools' on-campus residences are designed to foster. Consequently, SUNY's ban on commercial activity is a rational means of assuring that the campus residences—not just host students' quarters—will retain their unique noncommercial, educational character, and will not be overrun with vendors in derogation of SUNY's institutional mission.

SUNY's regulation is not, like the Public Service Commission policy in *Central Hudson*, directed solely at

commercial speech. It is directed at prohibiting the sale itself. *O'Brien* and *Clark* are appropriate because they provide a framework for analyzing governmental proscription of activity that has an incidental effect on speech. This approach permits regulation of "only the independent noncommunicative impact of conduct within its reach," *O'Brien*, 391 U.S. at 382, based on a substantial governmental interest and an appropriately narrow—not the least restrictive—means of protecting that interest. *Id.* (Although one can conceive a regulation permitting sales presentations but banning any order-taking or the consummation of any sale, resort to such an artifice is hardly compelled by *O'Brien*.) That result comports with this Court's view in *Widmar v. Vincent*, 454 U.S. 263 (1981), of universities' latitude in use of their facilities:

> [O]ur cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." . . . We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose *reasonable regulations* compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Id. at 267 n.5 (emphasis added, citation deleted). It is also important that use of the *O'Brien* framework offers the opportunity to analyze this case without deciding whether a dormitory room is a limited public forum or a nonpublic forum under *Perry* and related cases such as *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114 (1981). In fact, the notion of a dormitory room as a traditional locus of public

discourse is an unnecessary detour. *Compare Chapman v. Thomas*, 743 F.2d at 1059 (dormitories are nonpublic forums), *with American Future Systems*, 752 F.2d at 864 ("dormitories resemble public forums" and "one important use of dormitory rooms is as a forum for speech uninhibited by governmental interference—at least when such speech is desired by the students").

The accessory nature of public forum analysis to this case is well illustrated by reviewing *Clark*, which dealt with claims of free speech in what certainly is a public forum—Lafayette Park, across from the White House. The Park Service's reasonable time, place and manner restrictions forbidding camping in the park were not subjected to a less restrictive means test, despite claims of symbolic expression by demonstrators seeking to sleep there to publicize the plight of the homeless. Further, this Court noted that validation of the Park Service ban on camping need not be premised solely on the limited nature of the disruption that might be caused by the sleeping demonstrations planned by the Community for Creative Non-Violence. Rather, the Service could base its policy on the need to deal comprehensively with the problems sleeping demonstrations could cause. 468 U.S. at 296-97. The Court quoted *Taxpayers for Vincent*, 466 U.S. at 810, for the proposition that the regulation "responds precisely to the substantive problems which legitimately concern the [Government]." 468 U.S. at 297.

In *Clark*, preservation of national parks in the Capital "in an attractive and intact condition," 468 U.S. at 296, was a sufficient governmental interest to justify the Park Service's regulation. Similarly, when the state operates housing, it must act reasonably in maintaining its property in a safe condition in view of all circumstances, including the likelihood of injury to others, potential seriousness of the injury, and burden of avoiding risks. Courts have held that, under such a standard, the state has a duty to maintain sufficient security measures. *Miller v. State*, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984); *Preston v. State of New York*, 59 N.Y.2d 997, 998, 466 N.Y.S.2d 952, 453 N.E.2d 1241 (1983), *quoting Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 (1976). SUNY's ban is one means of accomplishing this result. To the extent that the regulation is reasonable, and is designed to establish and enforce sufficiently important institutional interests, it passes constitutional muster under *Clark*, even though it may directly limit oral or written expression.

Moreover, SUNY's interest in maintaining student residence halls that are safe, educational, and noncommercial need not be judged solely by reference to the conduct of American Future Systems, Inc. Absent the regulation, other commercial vendors undoubtedly would proceed to sell in the dormitories. Because SUNY has a legitimate interest in ensuring that the dormitories do not become inundated with commercial pursuits for personal gain, and because the residences would be more exposed to such harm without the ban on commercial activity on campus than with it, the ban is valid under the First Amendment as a reasonable regulation of the manner in which campus residences may be administered. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 652-55 (1981); *Taxpayers for Vincent*, 466 U.S. at 810.

Consequently, the Court of Appeals improperly assessed SUNY's regulation banning sales activities in its dormitories. This misplaced analysis has severe implications for state institutions of higher education across the country. Proper First Amendment analysis of this important federal question requires the intervention of this Court.[3]

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[3] This Court may consider the Second Circuit's plain error under Rule 34.1(a). *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982). Exercise of this authority is particularly appropriate where, as here,

II. Having Selected The Wrong Legal Test Based On *Central Hudson*, The Second Circuit Misapplied The "No More Extensive Than Necessary" Criterion, In Conflict With A Decision Of The Third Circuit On The Same Matter

Amici adopt the analysis in Part I of SUNY's petition regarding the Second Circuit's incorrect interpretation of the fourth prong of the *Central Hudson* test. *Petition* at 9-16. *Amici's* reliance on *O'Brien* and *Clark* achieves the same ultimate result as SUNY's argument based on *Central Hudson*. Properly applied, the two analytical paths are mutually supporting. Consequently, we write to offer additional views on the Second Circuit's interpretation of *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), in applying *Central Hudson*'s fourth prong.

The Second Circuit relied on *Posadas*' "deference to the legislature's assessment of the least restrictive effective measure" curtailing commercial speech. 16a. It believes this deference "implicitly endorsed" a less restrictive means analysis whenever *Central Husdon*'s "no more extensive than necessary" language is applied. *Id.*

This is a misreading of *Posadas*. First, as petitioners point out, this Court did not require the Puerto Rican legislature to adopt "counterspeech" (presumably anti-gambling advertisements) instead of a ban on advertisements aimed at attracting residents of Puerto Rico to gambling facilities. *Petition* at 14. Thus the most obvious "less restrictive means' was not required.

Second, this Court did not defer to the legislature based on a less drastic means analysis. That is, this Court did not review in detail other measures that the legislature might have adopted to protect residents from the evils of gambling establishments that were supposed

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the issue is a significant constitutional one not requiring further factual development.

to attract tourists. Rather, it simply observed that: "[t]he legislature could conclude . . . that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in potentially harmful conduct." 478 U.S. at 343. The Second Circuit should not require a closer "fit" between means and ends, *id.* at 342, for a state's limitation of commercial sales activity in a dormitory than was required for the limitation on advertising in *Posadas*. The courts should defer to SUNY's judgment in adopting its ban on commercial activity in dormitories in the same way that they deferred to the legislature's judgment in banning gambling advertisements directed to residents of Puerto Rico.

CONCLUSION

A writ of certiorari should issue to the Court of Appeals.

Respectfully submitted,

Of Counsel:
SHELDON E. STEINBACH
General Counsel
AMERICAN COUNCIL ON EDUCATION
Suite 800
One Dupont Circle, N.W.
Washington, D.C. 20036

RICHARD D. MARKS *
MICHAEL B. GOLDSTEIN
JANE B. BULBIN
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500
Counsel for Amici Curiae American Council on Education, American Association of State Colleges and Universities, National Association of State Universities and Land Grant Colleges, and National Association of Student Personnel Administrators

July 12, 1988

* Counsel of Record

AMICUS CURIAE

BRIEF

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CLERK

No. 87-2013

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

v.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAINO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF AMICI CURIAE UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CONNECTICUT, UNIVERSITY OF FLORIDA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, NORTHERN ILLINOIS UNIVERSITY, OHIO UNIVERSITY, THE OHIO STATE UNIVERSITY, UNIVERSITY OF SOUTH CAROLINA, UNIVERSITY OF RHODE ISLAND, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY AND THE UNIVERSITY OF VERMONT IN SUPPORT OF PETITIONERS

RODERICK K. DAANE*
CHARLES A. DUERR, JR.
MILLER, CANFIELD, PADDOCK AND STONE
101 North Main Street, 7th Floor
Ann Arbor, Michigan 48104-1400
(313) 663-2445
Attorneys for Amici Curiae

*Counsel of Record

July 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the First Amendment permit a state university to bar face-to-face commercial sales presentations and commercial transactions in state-owned students' dormitory rooms?

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BRIEF OF AMICI CURIAE UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CONNECTICUT, UNIVERSITY OF FLORIDA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, NORTHERN ILLINOIS UNIVERSITY, OHIO UNIVERSITY, THE OHIO STATE UNIVERSITY, UNIVERSITY OF SOUTH CAROLINA, UNIVERSITY OF RHODE ISLAND, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY AND THE UNIVERSITY OF VERMONT IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the University of California, University of Florida, University of Michigan, Michigan State University, Northern Illinois University, Ohio University, The Ohio State University, University of South Carolina, University of Connecticut, University of Rhode Island, Rutgers, The State University of New Jersey and The University of Vermont. Consent to file this Brief has been obtained from counsel for the parties and has been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

Amici Curiae [1] are state colleges or universities which own and operate student dormitories. Collectively, they are responsible for 873 residence halls occupied by approximately 122,000 students. As owners and operators of student dormitories, they are responsible for or have an interest in prevention of crime, protection against consumer exploitation, residential tranquility, and promotion of education. In discharging their responsibilities and advancing these interests amici limit or bar commercial activities in students' dormitory rooms by means of rules similar to the State University of New York (SUNY) regulations at issue in this case.

Amici oppose the Court of Appeals' unjustified interference with the good-faith efforts of SUNY to control its premises and accomplish its legitimate goals. To the amici universities this case implicates far more than the sale of cookware by the Pennsylvania pots and pans purveyor, American Future Systems, Inc. The fundamental right of state colleges and universities to control the use of their premises is at issue and the reach of the Court of Appeals' decision will seriously erode the authority of amici universities.

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[1]

Name	Enrollment	Resident Hall Occupancy	Number of Resident Halls
California	152,000	22,719	358
Connecticut	19,500	10,000	90
Florida	34,547	7,387	77
Michigan	35,495	9,550	18
Michigan State	42,096	17,550	26
Northern Illinois	24,000	7,600	6
Ohio	23,000	6,000	20
Ohio State	58,397	10,950	69
S. Carolina	37,071	6,065	25
Rhode Island	15,275	4,432	19
Rutgers	46,000	15,000	136
Vermont	11,160	4,000	29

SUMMARY OF ARGUMENT

The Court of Appeals opnion is in conflict with *American Future Systems v Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985), (hereinafter "*AFS III*")[2] which upheld Penn State's regulation of commercial speech in university-owned housing. In so doing, the Third Circuit specifically rejected the "least restrictive means" standard erroneously employed by the Court of Appeals below in invalidating SUNY's regulation.

The Court of Appeals also erred in declining to analyze this case pursuant to apposite use-of-public-forum authorities. Its basis for doing so was that American Future Systems, Inc. (AFS), the pots and pans peddler whose commercial speech is at issue, had withdrawn as a party to the case following the decision of the District Court.[3] Thus, said the Court of Appeals, the question of

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[2] This was the third decision of the Third Circuit involving issues between American Future Systems and Pennsylvania State University. See 618 F.2d 252 (1980) and 688 F.2d 907 (1982).

[3] As noted by the Court of Appeals, the same attorneys who represented AFS in the District Court continued to represent Respondents in the appellate proceedings, presumably at AFS expense. It is respectfully urged that the answer to the important constitutional question presented should not depend upon whether AFS is in the case as a formal party or as a shadow party. Clearly, AFS has a continuing interest in the outcome and its tactical withdrawal, which caused the Court of Appeals to disregard the excellent public forum analysis employed by the District Court and thus led to error, should not be permitted to dictate the outcome of this case.

Moreover, Judge Adams' remark in *AFS III* at 867, should be noted. He observed that the case had to date elicited seven judicial responses. Denial of certiorari made eight. The case at bar has now elicited three more and the ruling by this Court on SUNY's Petition for Certiorari will add another, for a total of twelve federal judicial responses from the states of Pennsylvania and New York alone. Clearly, AFS has demonstrated an appetite for litigation which suggests the need for intervention by this Court as the only alternative to the probable establishment of a new world record for litigious persistence.

access to residence hall rooms by third parties was no longer at issue (since the student respondents are clearly entitled to access) and therefore public forum analysis is inappropriate. Amici submit that public forum analysis of the uses made of SUNY's property is appropriate and was properly employed by the District Court, which upheld SUNY's time, place and manner regulation of commercial speech.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS, CREATES A CLEAR CONFLICT WITH A DECISION OF THE THIRD CIRCUIT AS TO WHETHER STATE UNIVERSITIES MAY BAR GROUP SALES DEMONSTRATIONS IN STUDENT DORMITORY ROOMS.

The decision of the Second Circuit below, *Fox v. Board of Trustees of State University of New York*, 841 F.2d 1207 (2d Cir 1988), rejected application of the public forum test of the reasonableness of time, place and manner regulation of First Amendment rights, and instead applied the commercial speech four-part analysis set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and *whether it is not more extensive than is necessary to serve that interest.* (Emphasis supplied)
>
> 477 U.S. at 566

The decision below could still have been in harmony with the Third Circuit decision in *AFS III*, but the Second Circuit erroneously read the fourth criterion in *Central Hudson* (restriction on commercial speech may be no "more extensive than is necessary to serve [the state's] interest") as a literal "least restrictive means" test.

In *AFS III*, the Third Circuit also applied the four-part commercial speech test of *Central Hudson*. However, it upheld the Penn State ban on group sales demonstrations in dormitory rooms and specifically rejected a "least restrictive means" reading of the *Central Hudson* fourth criterion. The ban on group sales demonstrations met the fourth criterion, in the eyes of the Third Circuit, "since it was not excessive in light of the state's objectives."[4]

State colleges and universities have carefully read the Third Circuit decision and tailored their regulations accordingly. The decision of the Second Circuit, with its strict application of a "least restrctive means" standard, jeopardizes the delicate balance these regulations have achieved, for any modestly creative plaintiff's lawyer can easily posit a new regulation which is just a little bit less restrictive.

Under this Court's Rule 17 a writ of certiorari is granted "only where there are special and important reasons therefor," and among such reasons is a conflict between the federal courts of appeals on the same matter. The "AFS decisions" of the Second and Third Circuits are in direct conflict with respect to the applica-

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[4] "Finally, we may uphold the regulation only if it is not excessive in light of the state's objective. This does not mean, of course, that if lesser restrictions on AFS alone would be sufficient to maintain the atmosphere in the dormitories, the university's regulations must fail. Rather, we must be convinced only that Penn State's total ban on group demonstrations in the dormitory rooms is necessary given the effect of allowing all commercial vendors access to the students' rooms on the same terms. 725 F.2d at 865.

tion of the fourth criterion of the *Central Hudson* test as applied to restrictions on commercial speech in state college and university dormitories. Many such restrictions are now called into question under the decision of the Second Circuit. In such circumstances granting the writ of ceritorari is appropriate.

II. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT BY FAILING TO APPLY A PUBLIC FORUM ANALYSIS TO PROPERTY OWNED BY A STATE UNIVERSITY AND BY APPLYING A RIGID LEAST RESTRICTIVE MEANS STANDARD TO A REGULATION OF COMMERCIAL SPEECH.

A. Restrictions on Speech on Public Property Have Been Subjected to Standards Developed under a Public Forum Analysis

As recently as June 27, 1988, this Court has had occasion to reaffirm the standards against which restrictions on public property speech are measured consistent with the First Amendment. *Frisby v. Schultz*, No. 87-168, —— U.S. —— (1988). The public forum analysis has been frequently and consistently applied.[5]

[5] Tracing the roots of the doctrine is beyond the scope of this brief, but the consistency and frequency of its application is illustrated by the following incomplete list. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (picketing on public way near schools); *U.S. Postal Service v. Greenburgh Civic Assn's*, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981) (letter boxes); *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (campus facilities of state university); *Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (school mail system); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (posting signs on public property); *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (sleeping in symbolic tents in national park); *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985) (violating bar of respondent's presence on military base during public open house); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (exclusion from participation in charity drive in federal offices); *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. ——, 107 S. Ct. ——, 96 L. Ed. 2d 500 (1987) (First Amendment activities in airport terminal).

The public forum analysis was synthesized in *Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37, 45-46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). The Court identified three categories of public property. The first is property "which by long tradition or government fiat have been devoted to assembly and debate." 460 U.S. at 45. As to "these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 460 U.S. at 45.

The second category consists of public property which the State has opened for expressive activity. 460 U.S. at 45. As to this category, "reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." 460 U.S. at 46.

The third category is "(p)ublic property which is not by tradition or designation a forum for public communication." 460 U.S. at 46. Here, the First Amendment does not guarantee access.

> In addition to time, place and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.
>
> 460 U.S. at 46.

The power of the State is not less than that of a private property owner to restrict the use of property to its in-

tended purposes. *U.S. Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981).

By ignoring the public forum cases, the Second Circuit brushed aside the right of a state university to impose a content-neutral time, place and manner restriction (if a dormitory room is a first or second category public forum) or to restrict the use of a dormitory room to its intended purpose (if it is not a public forum). The question of whether a dormitory room is a public forum may vary from university to university depending on the degree to which the university "has opened (it) for use by the public as a place for expressive activity." *Perry, supra*, 460 U.S. at 45. But universities such as amici, which have substantial and important governmental interests at stake, should not be denied the right to promulgate appropriate controls available under the public forum cases.

These cases have permitted a total ban on a medium of communication even in a public forum and even when the speech was noncommercial. The applicable test was enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 627, *reh'g den.*, 393 U.S. 900, 89 S. Ct. 63, 21 L. Ed. 2d 188 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.
>
> 391 U.S. at 377.

The "no greater than essential" standard is not the same as the "least restrictive means" standard employed below. Indeed a "least restrictive means" test has been expressly and frequently rejected as the standard for judging content-neutral time, place and manner regulations applicable to speech in a public forum.

In *City Council v. Taxpayers for Vincent, supra*, the Court upheld a complete ban on posters on public property in the interests of eliminating visual clutter, since the ban was narrowly tailored to serve that interest. The Court specifically rejected less restrictive but less efficacious alternatives such as limiting the types of public property to which the ban applied, exempting certain types of messages from the ban, allowing posters only during political campaigns, or imposing only size or color restrictions. 466 U.S. at 815.

In *Clark v. Community for Creative Nonviolence, supra*, this Court upheld a ban on sleeping on public land, which under the circumstances of the case was expressive conduct, because the regulation was narrowly drawn and there were ample alternative channels for communication. The Court rejected the argument that a less restrictive ban on cooking, digging or other aspects of camping could advance the government's interest without jeopardizing the symbolic action of sleeping to demonstrate the plight of the homeless.

Moreover, in *United States v. Albertini, supra*, this Court upheld a ban of an individual's presence on a military base during an open house for the public. The Court rejected less restrictive alternatives of advancing the governmental interests:

> . . . Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech . . . Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.
>
> 472 U.S. at 689.

Since this Court has explicitly refused to apply a "least restrictive means" test to governmental regulations

reaching political speech even in traditional public fora, there can certainly be no valid basis for the Second Circuit's application of such a test to a regulation reaching only commercial speech on SUNY's dormitory property, which can at most be considered a limited public forum opened by government action or, more properly, property which is neither by tradition or governmental action a public forum.

B. The Second Circuit Erred in Its Application of the Fourth Criterion of *Central Hudson*.

Having erroneously failed to recognize this case as a public-forum case, the Second Circuit compounded its error by applying a "least restrictive means" standard to commercial speech in SUNY dormitory rooms and thus afforded more protection to commercial speech than the First Amendment requires. Indeed, the Court of Appeals has created a startling anomaly: Commercial speech in the Second Circuit will now be entitled to greater protection than this Court has extended to political speech. Cf. *Boos v. Barry*, 485 U.S. ——, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *City Council v. Taxpayers for Vincent*, *supra*; *Cornelius v. NAACP Legal Defense & Ed. Fund*, *supra*.

Until *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), speech relating to purely commercial transactions was not understood to be protected at all by the First Amendment. When protection came it was limited, as explained in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978):

> We have not discarded the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to governmental regulation, and other varieties of speech . . . To require a parity of constitutional protection for commercial and noncommercial speech alike would invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.
>
> 436 U.S. at 455-456.

In *Central Hudson*, this Court, in addition to establishing the previously-discussed four-part analysis for a valid restriction, reaffirmed the subordinate position of commercial speech.

The Second Circuit erroneously interpreted the fourth part of the analysis ("not more extensive than necessary") as a literal "least restrictive means" standard. But *Central Hudson* did not apply that standard and to do so would "devitalize" the First Amendment in precisely the way cautioned against in *Ohralik*, *supra*. In *Central Hudson*, the Court rejected a total ban on Central Hudson's electric power advertising because there was no showing that more limited regulation would be ineffective in advancing the governmental interest in energy conservation.

A total ban on advertising leaves something less than ample alternative avenues of communication. But a ban on face-to-face group demonstrations or commercial sales in dormitory rooms does not eliminate alternatives. It is a narrow restriction which advances the legitimate governmental interest in prevention of crime, protection against consumer exploitation, preservation of residential tranquility,[6] and promotion of education. A narrowly-

[6] The importance of residential tranquility was emphasized in this Court's June 27, 1988 decision in *Frisby v. Schultz*, —— U.S. —— (1988).

tailored restriction need not be the least restrictive imaginable, especially when less restrictive means may compromise the interests otherwise advanced.

CONCLUSION

A Writ of Certiorari should issue to the Second Circuit Court of Appeals to permit this Court to review and affirm the validity of the restrictions placed on commercial activity in student dormitory rooms owned and operated by the State University of New York.

Respectfully submitted,

RODERICK K. DAANE*
CHARLES A. DUERR, JR.
MILLER, CANFIELD, PADDOCK
AND STONE
101 North Main Street, 7th Floor
Ann Arbor, Michigan 48104-1400
(313) 663-2445
Attorneys for Amici Curiae

ANTHONY J. CELEBREZZE, JR.
Ohio Attorney General
On behalf of:
Ohio University
The Ohio State University

*Counsel of Record

July 1988

AMICUS CURIAE

BRIEF

(6)

87-2013

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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Supreme Court of the United States

October Term, 1987

BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, et al.,

Petitioner,

v.

TODD FOX, et al.,

Respondents.

ON PETITION OF WRIT OF CERTIORARI TO THE THE SUPREME COURT OF THE UNITED STATES

AMICUS CURIAE BRIEF IN OPPOSITION TO CERTIORARI

Lewis B. Oliver Jr.
Oliver & Oliver
COUNSEL OF RECORD
156 Madison Avenue
Albany, New York 12202
(518) 463-7962

Anita Thayer, of counsel
Walter, Thayer, Long & Mishler
One Columbia Place
Albany, New York 12207
(518) 462-6753

July 13, 1988

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No. 87-2013

Supreme Court of the United States

October Term, 1987

The Board of Trustees of the State
University of New York, et al.,

Petitioner,

v.

Todd Fox, et al.,

Respondents.

BRIEF OF AMICUS CURIAE

THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.

INTRODUCTION

The Student Association of the State University of New York, Inc. (SASU) endorses and supports the position of the student respondents in the above-captioned case and opposes the granting of the writ of certiori to the petitioner.

This brief is presented to the Court with the consent of the parties to the action. Copies of their letters of consent have been filed with the Clerk.

The Student Association of the State University of New York, Inc., (SASU), was founded in 1970 and represents the 380,000 students of the State University system.

The functions of SASU are to represent, advocate and further the interests and welfare of the students of the State Univerty of New York. SASU does this by lobbying in the Legislature and the Executive Branch on behalf of students, litigating issues of

students' rights and developing programs for purposes which benefit students of the State University of New York. Traditionally, the student Trustee member of the SUNY Board of Directors is the President of the SASU.

Of the 64 campuses in the State University system, approximately 25 campuses, including all of the largest colleges and universities, have state-owned dormitories.

In 1972, the Board of Trustees of the State University of New York, (SUNY), the petitioner herein, directed all campuses to require mandatory dormitory living. Individual campuses can opt out of this requirement in certain circumstances. Students enrolled at campuses that do enforce mandatory dormitory living must reside in the state-owned dormitories as a condition of enrolling in these particular colleges. Only students who are bonafide "commuters" are exempt from mandatory dormitory living.

The SUNY Board of Trustees has also embarked on a policy of "privatization" of the dormitories. In 1980, by resolution, the Board approved the policy of economic self-sufficiency for the dormitories. The actual adoption of self-sufficiency was delayed until the 1985-86 fiscal year. This policy directs SUNY's colleges and universities to operate, maintain, and repair (including debt service) the dormitories on each of their campuses solely from funds paid by dormitory revenues. Rental rates are directed by the local housing market. The traditional taxpayer subsidy of state-owned dormitories is now only an historical concept. The resulting dormitory rate increases have varied from campus to campus, but SASU's projections are that the adoption of financial self-sufficiency will seriously increase the cost of public higher education in the near future. SUNY students are now required to live in dormitory housing at a greater cost than ever before.

QUESTION I: DID THE SECOND CIRCUIT CORRECTLY RULE THAT STUDENTS HAVE A FIRST AMENDMENT RIGHT TO USE THEIR DORMITORY ROOMS AS OTHERS USE THEIR PRIVATE HOMES OR APARTMENTS FOR ALL VARIETIES OF THE EXERCISE OF FREE SPEECH AND ASSOCIATION WITHOUT GOVERNMENT INTRUSION, CENSORSHIP OR RESTRAINT?

The primary issue presented in this litigation is whether or not students who live in college campus dormitories are afforded the First Amendment right of free association and free speech. The Second Circuit correctly ruled that students who live in college campus dormitories are entitled to a full measure of First Amendment protection within their private rooms.

In New York State, the Legislature has recognized the maturity of college-aged persons by establishing the age of 18 years as the minimum voting age and the minimum age to consent to marriage. (N.Y. Election Law §5-102, N.Y. Domestic Relations Law §7. The Legislature has also recognized the maturity of college students by permitting the SUNY students to select a Student Trustee who is a full member of the SUNY Board of Trustees. N.Y. Education Law §353(4).

Students live in dormitories for a variety of reasons. For some, as stated above, SUNY requires they live there; for others, the greater expense of private housing is prohibitive or there is an insufficient supply of private housing available; and for still others, the opportunity to meet and socialize with other students is the primary motivation for their decision to live in state-owned dormitory housing. Regardless of the reason a student chooses (or is forced) to live in a dormitory, he/she should not be forced to relinquish his/her First Amendment rights to freedom of speech and freedom of association.

While there have been a great variety of limitations placed on the First Amendment proclamation that "Congress shall make no law . . . abridging the freedom of speech," there has been great reluctance to allow those limitations into the home. In *Stanley v. Georgia* 394 U.S. 557 (1969), the U.S. Supreme Court said, "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 394 U.S. at 565. This statement was made in the context of the right to possess obscenity in the privacy of one's own home, but should be applied as vehemently in the context of the right to

engage in lawful commercial and non-commercial activity in one's own home.

As the Second Circuit recognized, for students living on the university campus, the dormitory is their home, and within their homes they are entitled to the constitutional protection that surrounds this private space. "University students are adults. The dorm is a home. . .To suggest a student who lives off campus in a boarding house is protected, but that one who occupies a dormitory room waives his constitutional liberties is at war with reason, logic, and law." *People v. Cohen* 57 Misc.2d 366, 292 N.Y.S.2d 706, 713. See also *Piazzola v. Watkins* 442 F.2d 284, 287 (1971); *Morale v. Grigel* 422 F.Supp. 988, 997 (1976).

New York State, or any of its agencies, would not be able to prohibit students from inviting American Future Systems or any other lawful group into their off-campus homes. The students who are required, or choose, to live on campus are entitled to the same degree of freedom of speech and freedom of association that are available to other adults in our society.

QUESTION II: IS THE UNIVERSITY'S BAN ON COMMERCIAL ACTIVITY IN THE DORMITORIES MORE EXTENSIVE THAN NECESSARY?

The speech and association rights of the students to receive commercial speech can only be infringed upon by the defendants upon proof that there is a substantial government interest and proof that this interest is advanced by said regulation, and proof that said regulation is not more extensive than necessary. See *Central Hudson Gas & Electric Corp v. Public Service Commission* 447 U.S. 557 (1980).

In the instant case the petitioner relies heavily on a rationale that appears to have developed from the long-discarded *in loco parentis* principle. The petitioner asserts a variety of lofty goals and purposes - all designed to protect the student.

Student dormitory residents do not need a ban on so-called commercial activity in the dormitories to protect them from commercial exploitation. New York State has been in the forefront of providing consumer protections to its residents. Dormitory students benefit from these protections like all New York State residents. For example, N.Y. Personal Property Law §425 *et seg.*

provides that any door-to-door sale of $25.00 or more may be cancelled within three (3) business days for any reason without penalty. This statute includes sales at home parties and "group demonstrations" such as those utilized by American Future Systems, Inc.

New York also has consumer laws that make certain deceptive business practices illegal. See N.Y. General Business Law §349 *et seg.* Also see N.Y. General Obligations Law §S-702, which mandates "plain language" in business contracts.

The residential character of the dormitories is not changed by the proposed activity at issue in this litigation. Invitational home parites, similar to those banned by petitioners regulation, are a frequent occurence in residential neighborhoods.

The SUNY Regulation survived constitutional scrutiny at the district court level because the constitutional rights of students were ignored. See *Fox v. Board of Trustees* 649 F. Supp 1993 (N.D. N.Y. 1986).

The District Court left unaddressed the controversy between the student residents and their "landlord". The Second Circuit decision properly focussed this litigation on the rights of students who live in dormitores.

These college dormitory rooms have been rented, leased and/or made available to students for their use as a home. The individual dormitory resident should be the person who decides who he/she will invite into that room - not the landlord.

CONCLUSION

WHEREFORE, The Student Association of the State University of New York, Inc. respectfully asks the Supreme Court to deny the application of the petitioner for a writ of certioari.

July 11, 1988

Respectfully submitted,

/s/LEWIS B. OLIVER

Oliver & Oliver
COUNSEL OF RECORD
156 Madison Ave.
Albany, NY 12202
(518) 463-7962

Anita Thayer, of counsel
Walter, Thayer, Long & Mishler
One Columbia Place
Albany, NY 12207
(518) 462-6753

STATEMENT OF INTEREST

The Student Association of the University at Albany is the recognized student government at the University at Albany. It provides funds for student groups through disbursement of the Student Activity Fee and advocates for student interests in the courts, legislature, and univeristy administration. The Student Association has approximately 10,000 members. Approximately 6,000 members of the Student Association reside in dormitories maintained on the University at Albany campus. As residents of these dormitories, these students are directly affected by regulations governing sales presentations in private dormitory rooms. They may wish to hear commercial presentations by private businesses in their dormitory rooms. If regulations restricting these presentations in private dormitory rooms are upheld, these members of the Student Association will be deprived of their constitutional right to hear these presentations and to associate with whom they wish in the privacy of their own dormitory homes.

Appendix A

JOINT

APPENDIX

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

No. 87-2013

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

ROBERT ABRAMS
O. PETER SHERWOOD*
LAWRENCE S. KAHN
PETER H. SCHIFF
DANIEL SMIRLOCK
The Capitol
Albany, NY 12224
(518) 474-8101
Counsel for Petitioners

HENRY T. REATH*
WAYNE A. MACK, JR.
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(212) 854-3428
Counsel for Respondents

*Counsel of Record

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No. 87-2013

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioner,

against

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Relevant Docket Entries in United States Court of Appeals for the Second Circuit

Date	Filings—Proceedings 87-7296
4-7-87	Notice of appeal filed.
5-4-87	Record on appeal filed (original papers of the district court).
6-5-87	*Amicus curiae* Student Association of the State University of New York brief filed.
6-8-87	*Amicus curiae* American Future Systems, Inc. brief filed.

6-9-87	Appellants' brief and appendix filed.
6-29-87	Appellees' brief filed.
7-16-87	Appellees' supplemental appendix filed.
7-16-87	Appellants' reply brief filed.
10-23-87	Case heard before Oakes, Cardamone, Mahoney, C. JJ.
3-11-88	Judgement reversed and cause remanded by published signed opinion. Judge Mahoney dissents in a separate opinion.
6-9-88	Notice of filing a petition for Writ of Certiorari in the Supreme Court filed (C.C. # 87-2013).

Relevant Docket Entries in United States District Court for the Northern District of New York

Date	Proceedings 82-CV-1363
1982	
Dec. 2	Filed complaint, issued summons and returned to attorney for service.
1983	
Jan. 3	Filed original summons with affidavit of service.
Jan. 10	Filed answer.
Feb. 11	Filed notice of motion for preliminary injunction.
June 3	Filed memorandum-decision and order of Judge McCurn dated 6/3/83 granting preliminary injunction.
1984	
Feb. 22	Filed notice of motion for leave to amend complaint.
April 23	Filed order of Judge McCurn dated 4/15/84 granting leave to amend complaint.
Sept. 10	Filed verified amended complaint.
Oct. 9	Filed answer to verified amended complaint.

1985	
1986	
Jan. 29	Filed answer to complaint as amended January 7, 1986.
Jan. 30	Filed verified amended complaint.
Sept. 24-Oct. 1	Trial.
Dec. 12	Memorandum-decision and order of Judge McCurn dated December 12, 1986, dismissing the complaint.
Dec. 17	Judgment filed.
1987	
Jan. 14	Notice of motion by plaintiffs for an order dropping American Future Systems as party.
March 18	Filed order denying motion for an order dropping American Future Systems as party.
April 7	Filed plaintiffs' notice of appeal.
1988	
Oct. 3	Filed memorandum-decision and order dated October 3, 1988 declaring resolution 66-156 as amended and interim regulations unconstitutional.
Oct. 18	Notice of motion by plaintiffs to amend findings of fact and to alter and amend judgment.
October 20	Order to show cause temporarily staying enforcement of court's order filed October 3, 1988; returnable December 6, 1988.

Opinion of United States District Court, Northern District of New York, Dated June 3, 1983, in American Future Systems, Inc., vs. State University of New York College at Cortland.

AMERICAN FUTURE SYSTEMS, INC., Kathleen Rapp and Todd Fox, Plaintiffs,

v.

The STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, The Board of Trustees of the State of New York, Clifton R. Wharton, Jr., Individually and as Chancellor of the Board of Trustees, James M. Clark, Individually and as Chancellor of the Board of Trustees, James M. Clark, Individually and as President of the College at Cortland, Raymond Franco, Individually and as Director of Housing at the College at Cortland, Margaret Attermeier, Individually and as Randall Residence Hall Director at the College of Cortland, and Officer Edward B. Moore, Individually and in his Capacity as Campus Police Officer at the College at Cortland, Defendants.

No. 82-CV-1363.

United States District Court,
N.D. New York.

June 3, 1983.

Corporation engaged in selling cookware, china, crystal, and silverware to college students through group demonstrations, one of its representatives and a state university student brought action challenging constitutionality of university regulation barring such activity. Plaintiffs moved for preliminary injunction. The District Court, McCurn, J., held that: (1) the speech in the group product demonstrations was only "commercial speech"; (2) although university did not function in loco parentis it could promote consumer protection within its confines; (3) dissemination of information was protected by the First Amendment but consummation of sales in residence halls was not so protected; (4) student's assocational rights were not implicated by prohibition on consummation of sales; (5) student's right of privacy was not infringed; and (6) exception for certain commercial activities was not arbitrary.

Preliminary injunction granted.

1. Injunction ⇐147

Burden on one moving for preliminary injunction is generally enhanced when the injunction would change the status quo.

2. Injunction ⇐147

Since seller of cookware and university student, seeking preliminary injunction against university regulation prohibiting product demonstrations in dormitory rooms,

alleged a deprivation of their First Amendment rights, irreparable harm was presumed. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.1(1)

Dissemination of information through group product demonstrations is "speech" and state regulation thereof must comply with the First Amendment. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐90.1(1)

Although the content or purpose of communicative activity may be commercial in nature, the activity does not thereby lose its character as "speech," and the method of communication, i.e., a physically present speaker, does not disqualify the activity as speech. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐90.1(1)

Under certain circumstances in-person communication may claim only lower level of First Amendment protection, but it is "speech" nonetheless. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇐90.1(1)

Permissible scope of governmental regulation is broader with respect to pure speech as opposed to commercial speech. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐90.1(1)

Possibility of some noncommercial value discernable in otherwise commercial speech does not automatically transform that speech into pure speech. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐90.1(1)

Group product demonstrations put on in student's dormitory room by seller of cookware, china, crystal and silverware constituted "commercial speech" for First Amendment purposes. U.S.C.A. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

9. Constitutional Law ⇐90.1(4)

Although constitutional protection of speech or expression does not stop at the schoolhouse gate, university's regulation of commercial speech was to be evaluated in light of special characteristics of the school environment. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⇐90.1(4)

Although state university may have tolerated noncommercial activities in residence halls that were more disruptive and hazardous than commercial activities would be, the university had not waived or forfeited its interest in managing residence halls affairs, including promulgating and enforcing regulations governing commercial activity, and there was nothing insidious about

singling out commercial activity, including commercial speech, for special regulatory treatment. U.S.C.A. Const.Amend. 1.

11. Constitutional Law ⇐90.1(4)

For purpose of First Amendment challenge to university regulation governing commercial activity in residence halls the three interests identified by the university, namely, preventing disruption, protecting the safety and security of students and protecting students from commercial exploitation, were legitimate and substantial. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇐90.1(1)

A state university may promote consumer protection within its sphere, provided
756 its regulations in furtherance of that goal restrict commercial speech no more extensive than is necessary to serve that interest and the regulations otherwise lawful. U.S.C.A. Const.Amend. 1.

13. Constitutional Law ⇐90.1(1)

Even where regulation restricting commercial speech directly promotes a substantial governmental interest, if that interest could be served as well by a more limited restriction the excessive restrictions cannot survive. U.S.C.A. Const.Amend. 1.

14. Constitutional Law ⇐90.1(1)

A blanket prohibition on commercial speech is a particularly overbroad and inappropriate means of protecting university

students from commercial abuses. U.S.C.A. Const.Amend. 1.

15. Colleges and Universities ⇐9
Constitutional Law ⇐90.1(4)

Dissemination of product information by seller of cookware, china, crystal, and silverware to college students through group demonstrations of the merchandise in a student's dormitory room was protected by the First Amendment but consummation of sales in residence halls was not so protected and university could lawfully prohibit consummation of sales in residence halls notwithstanding that seller was invited by the student. U.S.C.A. Const.Amend. 1.

16. Constitutional Law ⇐90.1(1)

Although consummation of a commercial transaction has communicative element, it is not "speech" protected by the First Amendment. U.S.C.A. Const.Amend. 1.

17. Constitutional Law ⇐91

State university student had First Amendment right to associate with other persons of his choice and where that association was purposeful it was protected regardless of whether the beliefs sought to be advanced pertain to political, economic, religious, or cultural matters. U.S.C.A. Const. Amend. 1.

18. Constitutional Law ⇐91

State university regulation restricting commercial activity in dormitories did not

implicate student's First Amendment associational rights notwithstanding that cookware seller, which put on group demonstrations, might no longer desire to associate with student in his dormitory room if it was unable to sell cookware to him at that time; however, blanket prohibition on all group activity would implicate associational rights. U.S.C.A. Const.Amend. 1.

19. Constitutional Law ⇐82(12)

University regulation restricting commercial activity in dormitory rooms did not impair student's constitutional right of privacy.

20. Constitutional Law ⇐251.3

Touchstone of due process is protection of the individual against arbitrary action of government. U.S.C.A. Const.Amends. 5, 14.

21. Constitutional Law ⇐278.5(5)

Neither state university student nor cookware seller, which held group demonstrations of its products in a student's dormitory room at student's request, were deprived of due process by virtue of university regulation precluding commercial activity, i.e., consummation of a sale in the dormitory, notwithstanding exception for commercial enterprises providing for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events. U.S.C.A. Const.Amend. 14.

22. Injunction ⇐136(2)

Preliminary injunction issued restraining enforcement of state university regulation governing operation of commercial enterprises on university property to extent of barring seller of cookware, china, crystal and silverware from disseminating and receiving information in course of group product demonstrations conducted in a dormitory room of an inviting student, although reasonable restrictions governing time, place and manner of such demonstrations were allowable. U.S.C.A. Const.Amend. 1.

Ronald H. Sinzheimer, Albany, N.Y., for plaintiffs; Duane, Morris & Heckscher, Henry T. Reath, George E. Pierce, Jr., Philadelphia, Pa., of counsel. 757

Robert Abrams, Atty. Gen. of the State of N.Y., Albany, N.Y., for defendants; Lawrence L. Doolittle, Asst. Atty. Gen., Albany, N.Y., of counsel.

McCURN, District Judge.

In one of the early Supreme Court cases involving what would now be called "commercial speech", the majority and two dissenting Justices were in confident agreement that a seller of mere "pots" or "gadgets or brushes" could claim no First Amendment protection for the hawking of such wares. *Breard v. City of Alexandria, La.*, 341 U.S. 622, 641, 650 n. *, 71 S.Ct. 920, 932,

936 n. *, 95 L.Ed. 1233 (1951). Since that time, the scope of protection accorded to commercial speech has expanded greatly, though by no means steadily. In this suit the Court must apply current commercial speech doctrine to the merchandizing of cookware.

American Future Systems, Inc. (AFS) is a corporation whose principal business is the sale of cookware, china, crystal, and silverware to college students through group demonstrations of its merchandise. It has brought this action for declaratory and injunctive relief against the State University of New York at Cortland (SUNY Cortland) and various state officers who have refused to permit it to conduct product demonstrations in campus dormitory rooms, even when invited to do so by students. AFS asserts that SUNY is thereby depriving it of its right to free speech. Kathleen Rapp, a representative of AFS and co-plaintiff, joins in that assertion. Todd Fox, a student who was denied permission to "host" one such demonstration, also a co-plaintiff, claims a deprivation of his rights of speech, privacy, and association. Claims under the due process and equal protection clause and the search and seizure clause are also asserted, as are pendent claims under the constitution and laws of New York State.

Presently before the Court is plaintiffs' motion for a preliminary injunction permitting them to conduct their demonstrations

at SUNY Cortland without interference *pendente lite*. In support of the motion, plaintiffs have furnished the Court with an extensive set of affidavits and exhibits, documenting the manner in which AFS conducts its business, the opinion of particular students and academicians as to the value of those demonstrations, and the events which preceded the commencement of this suit.

Although the defendants have by no means conceded all of the factual allegations of the plaintiff, they have taken the position that an evidentiary hearing is not necessary for determination of this motion since the allegations fail to entitle plaintiffs to any relief, preliminary or permanent, as a matter of law. They have, however, submitted one affidavit from a SUNY official, explaining the purpose of the chalienged policy.

The primary dispute between the parties is one of law. The Court considers itself to be adequately apprised of the factual setting by the affidavits and the exhibits to make a determination of this motion without need for an evidentiary hearing. *See, Herbert Rosenthal Jewelry Corp. v. Grossbradt*, 428 F.2d 551, 554 (2d Cir.1970). For the reasons set forth below, we hold that (1) plaintiffs are likely to prevail on their claim that SUNY may not, consistent with the First Amendment, completely prohibit AFS from disseminating information about its

products through group demonstrations in dormitory rooms when invited to do so by a student-resident; but that (2) plaintiffs are *not* likely to prevail on their claim that SUNY may not lawfully prohibit the consummation of sales at the conclusion of any such group demonstration.

I.

AFS presents its product demonstrations to groups of ten or more students in private student dormitory rooms upon invitation by a student residing in that room. The "student host" who invites the AFS representative, brings together with prospective customers, and provides use of his or her dormitory room for the demonstration, is given
758 certain "incentives" for performing such services.[1] AFS emphasizes that the demonstrations are informative and educational in that they teach students much about the products and also about sales. Purchases are made, usually by credit agreements, at the conclusion of the demonstrations.

The Board of Trustees of SUNY has implemented the following regulation challenged here:

1. The record does not reveal precisely what those "incentives" are; nor is it a material issue for this motion. We observe, however, that in a previous suit brought by AFS, it was found that prospective hosts were promised a gift and a chance to win a Florida vacation. *American Future Systems, Inc. v. Pennsylvania State University*, 464 F.Supp. 1252, 1256 (M.D. Pa.1979).

> No authorization will be given to private commercial enterprises to operate on State University campuses or facilities furnished by the University other than to provide for food, campus bookstore, laundry, dry-cleaning, barber and beauty services, and cultural events.

Resolution No. 66–156 as amended by 73-56. SUNY interprets this policy to bar AFS from conducting its demonstrations on all SUNY campuses.

The inevitable confrontation unfolded as follows: A representative conducting a demonstration in a dormitory room on October 17, 1982, was told to leave by the Resident Director and then the campus police; she did so. The following day, the AFS Regional Director, Kathleen Rapp, entered the dormitory to give a demonstration upon invitation by a student. As set forth in Ms. Rapp's affidavit, the dormitory director came into the room at the order-taking stage of the presentation, and told Rapp to leave the premises. Rapp replied that she had a constitutional right to stay. The campus police arrived and again told the representative to leave, and she again refused.[2] The officers then arrested Rapp on charges of loitering and soliciting without a permit. A charge of trespass was later added.

2. One of the police officers, Edward Moore, is a named defendant in the action.

Subsequently, another student—the plaintiff Todd Fox—agreed to host an AFS presentation in his dormitory room. He first requested permission from defendant Raymond Franco, Director of Resident Life at SUNY Cortland. Franco responded by a letter denying Fox permission to host the demonstration and stating that legal action, other than arrests, would be taken if any such demonstration were held.

This suit was commenced on December 2, 1982. Defendant has filed an Answer asserting, primarily, the defense that "there is no constitutional or other right to conduct commercial activities in public facilities and in University dormitories or residence halls in particular", and that there is a substantial state interest in barring such activities.

II.

AFS is currently prosecuting a similar suit in federal court against Pennsylvania State University, and has, after extensive litigation, secured a narrow preliminary injunction whereby the named student-plaintiff may host product demonstrations *pendente-lite*. *American Future Systems, Inc. v. Pennsylvania State University* et al. ("*AFS v. Penn State*"), No. 81–0171, 553 F.Supp. 1268 (M.D.Pa.1982). Since the suit in Pennsylvania raises many of the issues present herein, it is instructive to summarize the course of that litigation before turning to the instant motion.

In its initial action in Pennsylvania, AFS asserted the right to conduct group product demonstrations and sales in common areas of the residence hall. After a trial with an advisory jury, Judge Muir issued fact findings that, *inter alia*, vendors had alternative means of both communicating with and selling to students; that AFS had engaged in questionable sales practices; that Penn State was enforcing a general rule against commercial solicitation and was not singling out AFS for enforcement of the rule on account of any particular practice by AFS. *AFS v. Penn State*, 464 F.Supp. 1252, 1254–8 (M.D.Pa.1979).

The Court then held that AFS had a right under the First Amendment to disseminate information as to the product that it sells, but that it did not have a right "to sell its merchandise to college students in the manner which it has selected as being most conducive to sales." *Id.* at 1262. After concluding that the ban on group product demonstrations and sales was "justified by Penn State's interest in preventing the dangers inherent in in-person solicitation or sales, or alternatively, by Penn State's interest in protecting the privacy of its students within the residence halls", *Id.* at 1265, the Court ordered judgment for the defendant.

On appeal, the Third Circuit affirmed Judge Muir's decision. *AFS v. Penn State*,

618 F.2d 252 (3d.Cir.1980). However, in so doing, the Court emphasized that Penn State had offered to permit AFS to conduct its demonstrations provided it did not transact business at the conclusion of such demonstrations:

> Here Penn State has not totally supressed the speech of the plaintiff. It has restricted that speech somewhat, however. Although AFS sales representatives are allowed into the residence halls to present demonstrations to groups of students, they cannot consummate sales at these gatherings. Even that restriction is removed if the sales representative is invited to the hall by an individual student who decides to purchase the merchandise marketed by AFS.

Id. at 258.

The Court further held that Penn State had a legitimate basis for distinguishing between commercial and non-commercial speech, and that its prohibition of commercial transactions was a valid measure "to preserve better the traditional college environment and atmosphere conducive to effective education and learning". *Id.* at 259.

AFS interpreted the Third Circuit decision as an acknowledgment of its right to present unregulated product demonstrations in the common areas of Penn State's residence halls, and it returned to District Court to obtain a preliminary injunction

barring interference with such demonstrations. At the same time it also sought an injunction permitting it to conduct group demonstrations and sales in students' dormitory rooms. Moreover, six students joined as co-plaintiffs, asserting their own speech, association, and privacy rights to host or attend demonstrations in both the common areas and dormitory rooms. Judge Muir denied the preliminary injunctions on the grounds that (1) AFS's claims were barred by *res judicata;* (2) the students' claims lacked the requisite showing of irreparable harm and probability of success on the merits. *AFS v. Penn State,* 510 F.Supp. 983 (M.D.Pa.1981). The Court noted that the student plaintiffs were free to attend the demonstrations in the residence hall common areas and subsequently purchase the goods individually in their rooms. In addition to finding no infringement of any free speech rights, the Court specifically found no likelihood of the students prevailing on privacy or associational rights grounds, since it was unable to discern how either of those rights were curtailed.

Upon subsequent motion by the defendant, the District Court granted summary judgment against AFS, essentially repeating the same analysis as in its previous denial of a preliminary injunction. *AFS v. Penn State,* 522 F.Supp. 544 (1981). One arguably new issue raised at this stage of

the litigation involved plaintiffs' claim that Penn State engaged in "censorship" when it screened AFS' presentation to ensure that they were only informational and did not involve commercial solicitation. The Court found that the material which AFS sought to include in its presentation was impermissible under prior decisions in the case, and therefore rejected the charge of censorship. Again, the Court held that Penn State's regulations were not a significant infringement of the students' speech, privacy, or associational rights.

Plaintiffs again appealed to the Third Circuit, which addressed separately the claim of censorship and the student's claim of a right to host or attend group demonstrations in their dormitory rooms. *AFS v. Penn State*, 688 F.2d 907 (1982). The Court discerned in the censorship claim a new issue, not barred by *res judicata:* whether Penn State could prohibit portions of AFS' demonstration on the basis of content, in addition to barring consummation of the transaction. The Court found that Penn State had been preventing AFS from disclosing price, credit, and guarantee terms, information which the Court regarded as protected commercial speech under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Failing to find a substantial governmental in-

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terest in this content-based restriction, the Court reversed the summary judgment previously entered against AFS.

Turning to the student's claims, the Court first agreed with the district court that Penn State could limit AFS activities in the *common areas* of the residence halls to the dissemination of information, and could bar the transactions that typically followed product demonstrations. But it found that the district court failed to adequately consider "the students' associational and free speech rights in their activities in their dormitory rooms independently from the activities conducted in the common areas," *Id.* at 915. The Court acknowledged that "Penn State may indeed have a satisfactory reason for distinguishing between group activity in individual dormitory rooms and in common areas", *id.* at 915, but the record below did not reveal it. Consequently, summary judgment as to the students was also reversed, and the case remanded to the district court.

Once again before Judge Muir, plaintiffs re-moved for a preliminary injunction to enable the students to hold demonstrations of AFS merchandise in their dormitory rooms. The Court held first that AFS' rights were derivative, and not sufficient to warrant a preliminary injunction on their behalf; nor could AFS demonstrate irrepa-

rable harm if the injunction were denied. *AFS v. Penn State, supra*, 553 F.Supp. 1268 (1982).

However, Judge Muir regarded the students' claim as more substantial, particularly their assertion of speech rights. Irreparable harm was discerned in (1) the intangible nature of the constitutiona' right in question and its incapability of redress by damages, and (2) the temporary duration of the plaintiff-students' residence in the dormitories.

Turning to the question of "probable success on the merits", the Court found the students' chances of success quite strong. It reasoned that Penn State's restriction on commercial activities are invalid unless they "leave open alternative channels for communication", *id.* at 1280, and found a lack of such alternative channels. It then analyzed the purported "significant governmental interests" suggested by Penn State (i.e., to protect students' privacy, avoid disruption, protect students from misleading or coercive sales practices, etc.) and found those interests "unconvincing", *id.* at 1280, in view of other activities permitted in the dormitories. The Court also observed that more narrowly tailored regulations could serve the university's interest in preventing disruption and other anticipated problems.

The Court therefore concluded that an injunction was warranted, but it tailored

that injunction quite narrowly: relief was granted only as to the one named plaintiff who was still a student at the time of the decision.

With the benefit of several thorough and highly pertinent decisions from Judge Muir and the Third Circuit in hand, we turn to the motion now before this Court.

III.

[1] To obtain a preliminary injunction in this Circuit, the movant must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief." *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir.1979). *Phillips v. Marsh*, 687 F.2d 620 (2d Cir.1982). Movants' burden is generally considered enhanced when the injunction sought would change the status quo. *See, Holy Spirit Assn., Etc. v. Town of New Castle*, 480 F.Supp. 1212, 1214 (S.D.N.Y.1979) ("The purpose of the preliminary injunction is to preserve the status quo between the parties pending a full hearing on the merits"); *Patterson v. United Fed. of Teachers*, 480 F.Supp. 550, 553 (S.D.N.Y.1979).

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[2] The requirement of "irreparable harm" is satisfied in this case by the very

nature of the claim. In *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976), the Supreme Court held that "(t)he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Since plaintiffs have alleged deprivation of their First Amendment rights, irreparable harm must be presumed. *See, Intern. Soc. for Krishna, Etc. v. City of N.Y.*, 484 F.Supp. 966, 970–71 (S.D.N.Y.1979); *NYPIRG v. Village of Roslyn Estates*, 498 F.Supp. 922, 930 (E.D.N.Y.1979); *St. Martin's Press, Inc. v. Carey*, 440 F.Supp. 1196, 1204 (S.D.N.Y.1977); see also, *Katz v. McAulay*, 438 F.2d 1058, 1060 n. 3 (2d Cir. 1971).

The next prong of the preliminary injunction standard, "likelihood of success on the merits", involves the Court in evaluating the merits of plaintiffs' claims. Clearly the claim of deprivation of first amendment speech rights is the most substantial ground for challenging the university regulation, and that claim is addressed first.

IV.

[3–5] The dissemination of information through group product-demonstrations is "speech", and the regulation of such demonstrations must comport with the First Amendment.[3] *AFS v. Penn State, supra,*

3. "Congress shall make no law ... abridging the freedom of speech ..." U.S. Const. Amend. I.

464 F.Supp. 1252 (M.D.Pa.1979), *aff'd*, 618 F.2d 252 (3d Cir.1980). We thus reject at the outset defendants' contention that "(t)his case does not involve speech". *Affidavit in Opposition* at 4. A demonstration of AFS products plainly includes communicative activity. Though the *content* or *purpose* of that communicative activity may be commercial in nature, the activity does not thereby lose its character as "speech". *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Nor does the *method* of communications—involving a physically present speaker—disqualify the activity as speech; indeed, it is a more literal form of speech than the advertising in *Virginia Pharmacy*. Of course, under certain circumstances in-person communication may claim only a lower level of First Amendment protection, but it is "speech" nonetheless. *See, Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978).

[6] At the same time, the Court remains completely unconvinced by the record before it that the "speech" in question is "pure" as opposed to "commercial" speech. The distinction is significant in that "(t)he Constitution... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression", *Central Hudson Gas & Electric Corp. v. Public Ser-*

vice Comm'n of New York, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980), and the permissible scope of governmental regulation is broader with respect to the former.

"Commercial speech" has been variously defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson, supra*, 447 U.S. at 561, 100 S.Ct. at 2348, or "speech proposing a commercial transaction", *Id.* at 562, 100 S.Ct. at 2349, *citing Ohralik, supra*, 436 U.S. at 455–56, 98 S.Ct. at 1918. *See also, Virginia Pharmacy, supra*, 425 U.S. at 762, 96 S.Ct. at 1825 ("speech which does 'no more than propose a commercial transaction' "). Commentators have recognized the difficulty in arriving at a satisfactory definition, *see*, Notes: Constitutional Protection of Commercial Speech, 82 *Col.L.Rev.* 720, 720 n. 2; *see also, Central Hudson, supra*, 447 U.S. at 598, 100 S.Ct. at 2368 (Rehnquist, dissenting), and the above-mentioned formulations have been criticized as too broad and apt to embrace more valuable forms of speech. *Central Hudson, supra*, 447 U.S. at 579–83, 100 S.Ct. at 2358–60 (Stevens, J. concurring). In practice, however, the Court has had little difficulty in making what it essentially considers to be a "common sense distinction", *Central Hudson, supra*, 447 U.S. at 562, 100 S.Ct. at 2349, quoting, *Ohralik, supra*, 436 U.S. at 455, 98 S.Ct. at 1918, and

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it has scarcely hesitated to apply the "commercial speech" label in a variety of contexts where the communication tended to promote the sales of goods or services. *See, e.g., Village of Hoffman Estate, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (displaying and marketing of drug-related paraphernalia); R___ M.J.___, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) (attorney area of practice advertising); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (billboard advertising) *Central Hudson, supra*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (promotional advertising by utility); *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979) (use of trade name by optometrist); *Ohralik, supra*, 436 U.S. 447, (1978) (in-person solicitation by attorney); *Virginia Pharmacy, supra*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (drug price advertising).

In support of its view that the speech in question is "pure speech", plaintiff has submitted affidavits from two academicians with impressive credentials, who attest to the "informative and educational" value of the AFS presentation. In particular, the demonstration is said to not only enlighten the audience as to the virtues of AFS products, but also to teach students about "budgeting and planning for the future", to cause them "to review their non-academic

oriented personal priorities", and to afford them "insights into a real life situation involving group dynamics". *Affidavit of Dr. Larry J. Krafft* at 3.

The Court acknowledges that there may be something to be learned from AFS demonstrations beyond the core information necessary for a commercial transaction, and that the listener may in some sense benefit from the experience. Indeed, we would also find it difficult to dispute the observation of John Dewey that "all communication ... is education. To be a recipient of a communication is to have an enlarged and changed experience". J. Dewey, *Democracy and Education* 6 (1916), quoted from Notes: Constitutional Protection of Commercial Speech, *supra*, 82 *Col.L.Rev.* at 740 n. 145. However, the ability of the plaintiff to identify some abstract non-commercial value which might be gleaned from the sales presentation does not disable the Court from making the "common sense distinction" required by the Supreme Court.

[7, 8] The Court expressly dealt with the problem of subordinate non-commercial attributes of otherwise commercial speech in *Central Hudson*. In addressing the concern expressed by Justice Stevens, that advertising by the utility raised questions beyond those of a purely commercial nature, the Court warned against "blur(ring) further the line that the Court has sought to draw in commercial speech cases". 447 U.S. 562 n. 5, 100 S.Ct. at 2349 n. 5. Continuing, the Court observed that,

> (Justice Stevens' approach) would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. We rule today ... that *utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions...* As we stated in *Ohralik*, the failure to distinguish between commercial and non-commercial speech 'could invite dilution, simply by a leveling process, of the force of the (First) Amendment's guarantee with respect to the latter kind of speech'.

Id. at 562 n. 5, 100 S.Ct. at 2349 n. 5 (citations omitted; emphasis added). Thus the Court has instructed that the distinction between "commercial speech" and "pure speech" be made, and that the possibility of some non-commercial value discernable in the communication does not automatically transform the former into the latter.

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> It has been observed that:
>
> (a)ny advertiser could insert a public interest element into his message . . . Commentators have argued, however, that the line drawing problem is not in practice a serious one, in any case not serious enough to justify abandoning the distinction entirely.

Notes: Constitutional Protection of Commercial Speech, supra, 82 *Col.L.Rev.* 726 n. 42. *See also, Irwin v. Gavit,* 268 U.S. 161, 168, 45 S.Ct. 475, 476, 69 L.Ed. 897 (1925) (Holmes, J.) (where to draw lines "is the question in pretty much everything worth arguing in the law"). After considering the preliminary record before the Court on this motion, we presently regard the speech in plaintiffs' group product demonstrations as only "commercial speech", in accordance with the definition set forth in *Central Hudson.*

V.

Having provisionally identified plaintiffs' activity as commercial speech, we next must evaluate the regulation in accordance with the standard established in *Central Hudson:*

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 567, 100 S.Ct. at 2352.

[9] Before commencing this *Central Hudson* analysis, we note that this particular regulation of commercial speech must be evaluated "in light of the special characteristics of the school environment", *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). More specifically, the Supreme Court has explained that:

> A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with the mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Widmar v. Vincent, 454 U.S. 263, 268 n. 5, 102 S.Ct. 269, 273 n. 5, 70 L.Ed.2d 440 (1981).

At the same time, however, it is clear that the constitutional protection of speech or expression does not stop "at the school-

house gate". *Tinker, supra*, 393 U.S. at 506, 89 S.Ct. at 736. Our task, then, is to measure the regulation against the *Central Hudson* standard, with due consideration for the university's educational objectives.

A.

The initial inquiry involves the lawfulness and truthfulness of the speech being regulated. Defendant has not contended on this motion that a group demonstration of cookware is unlawful, except insofar as it transgresses the university regulation challenged herein. Nor has the defendant chosen, at this stage, to submit evidence tending to show that the information disseminated by AFS is deceptive or misleading. It has been suggested, however, that the speech in question is inherently coercive, because it is delivered in the course of in-person solicitation. The extent to which an AFS demonstration may be deemed "in-person solicitation" and analyzed accordingly is addressed
764 below. But it may be noted here that, even if accurate, the characterization "does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny." *Ohralik v. Ohio State Bar Ass'n., supra*, 436 U.S. at 457, 98 S.Ct. at 1919. Thus, plaintiffs' speech appears to satisfy the first step of the *Central Hudson* analysis.

B.

The next step in this analysis is determining whether the interests asserted by the government are substantial. The defendants have submitted an affidavit by Dr. Ronald M. Bristow, Assistant Vice Chancellor for Student Affairs for SUNY, wherein he attests that "[t]he continuation of State University's policy prohibiting such [commercial] activity, particularly as applied to residence halls, is crucial to the fulfillment of the University's educational mission". *Affidavit of Dr. Bristow* ¶ 7. In particular, Dr. Bristow maintains that extending use of the densely populated residence halls to private commercial activities "would introduce a potential disruptive element which would make it far more difficult to maintain the desirable educational atmosphere." *Id.* ¶ 10. He also anticipates that the presence of commercial activities would make it far more difficult for the university to meet its "legal obligation to provide and maintain safe and secure residence hall facilities to its students." *Id.* ¶ 12. Finally, although he acknowledges that the university does not function *in loco parentis*, Bristow nonetheless states that "there is a reasonable expectation that the University will not create or condone situations where students may be captively exposed to unethical exploitation".

[10] Thus, the three interests identified by the university are (1) preventing disruption; (2) protecting the safety and security of the students; and (3) protecting students from commercial exploitation. It is clear to the Court that the first two of these interests are legitimate and substantial. Plaintiffs allege—and it may well be the case—that the university tolerates non-commercial activities in the residence halls that are more disruptive and hazardous than commercial activity would be. We find no support for the view, however, that by tolerating certain forms of disruptive or hazardous activities the university has waived or otherwise forfeited its interest in managing residence hall affairs. Moreover, we can discern nothing insidious about singling out commercial activity—including commercial speech—for special regulatory treatment. The Supreme Court has consistently held that commercial speech is to be accorded "a limited measure of protection, commensurate with its subordinate position on the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression". *Ohralik, supra*, 436 U.S. at 456, 98 S.Ct. at 1918. The University's greater tolerance of non-commercial speech in its residence halls is thus in harmony with current First Amendment doctrine. *See, AFS v. Penn State, supra*, 618 F.2d at 259 (". . . AFS is incorrect in its assertion

that Penn State policy violates the First Amendment because it treats non-commercial speech differently from commercial speech").

[11] The third interest identified by the defendants, protection of the students from commercial exploitation, is also legitimate and substantial. Consumer protection is quite obviously an area of considerable governmental interest, as evidenced by the multitude of state and federal legislation on the subject. To be sure, the Supreme Court has emphatically rejected "the 'highly paternalistic' view that consumers are to be protected by 'being kept in ignorance'." *Virginia Pharmacy, supra*, 425 U.S. at 769, 96 S.Ct. at 1829; *see, Central Hudson, supra*, 447 U.S. at 562, 100 S.Ct. at 2349. However, the Court was plainly concerned with the *method* by which the government sought to promote consumer protection; it by no means intimated that the protection of consumers was not a valid area of governmental interest.

[12] It is also clear that SUNY Cortland does not function *in loco parentis*, *Bradshaw v. Rawlings*, 612 F.2d 135, 138-40 (3d Cir.1979); *Bellnier v. Lund*, 438 F.Supp. 47, 53 (N.D.N.Y.1977) (Munson, C.J.). Though not a parent, SUNY is nonetheless a governmental entity administering a campus with a substantial student population. The Court finds no basis for concluding that it

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may not promote consumer protection within its sphere, provided its regulations in furtherance of that goal are tailored to comply with the *Central Hudson* standard (e.g., the restriction of commercial speech may be no "more extensive than is necessary to serve that interest"), and are otherwise lawful.

C.

Having concluded that the governmental interests identified by the defendants are substantial, it becomes necessary to consider "whether the regulation directly advances the governmental interest asserted ..." *Central Hudson*, 447 U.S. at 567, 100 S.Ct. at 2352. In this regard, the Supreme Court has instructed that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose". Id. at 564, 100 S.Ct. at 2350.

Based on the record before the Court on this motion, there appears to be only an indirect link between the restriction of commercial speech and the prevention of disruptive, unsafe, and unsecure conditions in the residence halls. Defendant's view, that the restriction is all that stands between the students and a flood of distracting commercialism has simply not been substantiated. Because the rule appears premised upon "an undifferentiated fear or apprehension

of disturbance" rather than "a demonstrable harm", it does not withstand the rigorous scrutiny the First Amendment warrants. *Tinker v. DeMoines Independent Com. Sch. Dist.*, *supra* 393 U.S. at 508, 89 S.Ct. at 737; *Katz v. McAulay*, *supra*, 438 F.2d at 1061.

Although this conclusion is based solely on the record adduced at this motion, we note that Judge Muir arrived at a similar conclusion based on the record before that note that Judge Muir arrived at a similar conclusion based on the record before that Court. *AFS v. Penn State*, *supra* at 33–34 (Dec. 21, 1982) ("as drafted, Penn State's regulations do not address anticipated problems").

By contrast, the prohibition of all commercial activity most certainly does directly advance the university's interest in consumer protection, but as discussed below in the fourth part of the *Central Hudson* analysis, it is more extensive than is necessary to serve that interest.

D.

[13] Even where a regulation restricting commercial speech directly promotes a substantial governmental interest, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive". *Central Hudson*, *supra*, 447 U.S.

at 564, 100 S.Ct. at 2350. Applying this criterion, the most conspicuous defect of the university regulation appears. One would have to be "unimaginative indeed" to be unable to conceive of less onerous means that would adequately serve the interests identified by the defendants. *Widmar v. Vincent, supra,* 454 U.S. at 279 n. 3, 102 S.Ct. at 272 n. 3 (Stevens, J., concurring), *quoting, Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S. 173, 189, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (1979) (Blackmun, J., concurring). To begin with, it is likely that the university's interest in preventing disruptive, unsafe, and unsecure conditions in the residence halls could be served by reasonable restrictions on the time, place, and manner of product demonstrations. The registration of invited vendors might further serve such interests. Plaintiffs have indicated their willingness to abide by such rules; defendants have advanced no persuasive reasons why such rules would be ineffective or impractical.

[14] A blanket prohibition on commercial speech is a particularly overbroad and inappropriate means of protecting students from commercial abuses. In *Virginia Pharmacy, supra,* 425 U.S. at 769–770, 96 S.Ct. at 1829, the Supreme Court emphatically rejected the view that government may protect consumers by shielding them from commercial information. As the Court explained:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id. at 770, 96 S.Ct. at 1829. *See also, Linmark Assoc., Inc. v. Township of Willingboro,* 431 U.S. 85, 97, 97 S.Ct. 1614, 1620, 52 L.Ed.2d 155 (1977). For this reason, the state may not "completely suppress information when narrower restrictions on expression would serve its interests as well." *Central Hudson, supra,* 447 U.S. at 565, 100 S.Ct. at 2351.

There appear to be a number of less restrictive means by which the university may further its interest in protecting students from the commercial abuses which would arguably accompany commercial speech in the residence halls. The registration of vendors who are invited to demonstrate their wares on campus would serve the interest in consumer protection as well as the others interests discussed previously. The university might also exclude from residence halls vendors found to have engaged in misleading speech or other abusive practices.

Defendant has contended that group product demonstrating is itself an abusive practice which may be banned completely. Support for this contention is derived from *Ohralik v. Ohio State Bar Ass'n., supra,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), in which the Court held that a bar association could constitutionally prohibit the in-person solicitation of clients by lawyers. Although *Ohralik* does address special dangers inherent in solicitation by lawyers, it is by no means inapposite. There is a clear recognition in *Ohralik* of the "detrimental aspects of face-to-face selling even of ordinary consumer products." *Id.* at 464, 98 S.Ct. at 1922. Indeed, the Court identified the particular abuses engendered by in-person solicitation, which justify a broader scope of governmental regulation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking . . .

Id. at 467, 98 S.Ct. at 1924. *See also, AFS v. Penn State, supra* 464 F.Supp. at 126.

However, it appears on the record before the Court that the activity engaged in by AFS is not truly "in-person solicitation" in the sense used in *Ohralik*. The abuses identified by the Court primarily arise when, as in *Ohralik*, the seller approaches the prospective customer without invitation. By contrast, AFS representatives are invited to conduct their demonstrations, and interested students voluntarily attend. While it is true that the prospective customers are then subjected to a "one-sided presentation", and it may also be the case that AFS "encourage(s) speedy and perhaps uninformed decisionmaking" (although this has not yet been proven), the government's interest is considerably attenuated where such customers have approached the vendor rather than the reverse.

[15] There is an even more basic reason why the dangers of in-person solicitation expressed in *Ohralik* do not support the suppression of commercial speech in this case. As set forth, *infra*, the Court finds it necessary to distinguish between the dissemination of information by AFS, which is protected by the First Amendment, and the consummation of sales in residence halls, which is not so protected. Because it is the Court's determination that SUNY may lawfully prohibit the consummation of sales in residence halls, then the most abusive aspect of in-person solicitation—that it "de-

mands an immediate response without opportunity for comparison or reflection"—is removed. 767

It, therefore, appears to the Court that the plaintiffs are likely to prevail on their claim that the defendants may not constitutionally prohibit AFS from conducting a group demonstration of its products in a dormitory room at SUNY Cortland when invited to do so by the resident-student. The complete ban on such commercial speech does not satisfy the final two requirements of *Central Hudson*, that the regulation directly advance the governmental interests asserted, and that it be no more extensive than necessary to serve such interests.

VI.

[16] As warned above, the determination that plaintiffs are likely to establish a First Amendment right to disseminate and receive commercial information in dormitory rooms is not the end of this analysis. It appears from the record that the group product-demonstration conducted by AFS consists of two portions: a communicative portion wherein the products are described and other information is imparted, and a subsequent transactional portion wherein sales contracts and credit agreements are concluded. The first portion is commercial speech, and is protected by the First

Amendment to the extent discussed previously. The second portion, however, is legal conduct—the creation of legal relations by contract. Although the consummation of a commercial transaction has a communicative element, it is not "speech" protected by the First Amendment. As the Supreme Court emphasized in *Ohralik v. Ohio State Bar Ass'n, supra*, 436 U.S. at 457, 98 S.Ct. at 1919:

> Moreover, "*it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed*". *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities ... corporate proxy statements ... the exchange of price and production information among competitors ... and employer's threats of retaliation for the labor activities of employees ... Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. (emphasis added).

Indeed, In *Ohralik*, the Court recognized virtually the same distinction being made here when it noted that, "The [Bar association's] Rule does not prohibit a lawyer from giving unsolicited advice; it proscribes the acceptance of employment resulting from such advice".[4] 436 U.S. at 458, 98 S.Ct. at 1919.

The decisions involving Penn State have consistently recognized that the consummation of sales is subject to greater regulation than the dissemination of information. In the first such decision, *AFS v. Penn State, supra*, 464 F.Supp. at 1256, Judge Muir found that AFS demonstrations were comprised of two parts: "a demonstration of . . . products" and "a sales portion"; and he upheld the regulation based, in part, on his conclusion that "[e]ssentially, Penn State has attempted to separate business transactions from the speech which accompanies them and has sought to regulate only the former." *Id.* at 1262.

On appellate review, the Third Circuit rejected AFS's contention that it had a First Amendment right, under *Virginia Pharmacy*, to sell its products. As the Court explained,

4. *Ohralik* is nevertheless accurately characterized as a "commercial speech" case, because the rule prohibited solicitation, which is "speech", as well as the consummation of an employment agreement which is "conduct". 436 U.S. at 453 n. 9, 98 S.Ct. at 1917 n. 9.

> The [*Virginia Pharmacy*] Court did not hold that because an individual may have a right to receive certain advertising information that individual also has a right to participate in a commercial transaction whenever he or she pleases.[5]

The subsequent Penn State decisions did not abandon this distinction. A complicating factor arose, however, in that Penn State attempted to censor the speech engaged in by AFS, by eliminating from the presentation language that constituted "the solicitation of sales rather than educational or informational information". *AFS v. Penn State*, 522 F.Supp. at 549; *see also, AFS v. Penn State, supra*, 510 F.Supp. at 986. When the case returned to the Third-Circuit, the Court explained that, while it had previously upheld Penn States' regulation of the *consummation* of transactions, it was now being called upon to decide "whether Penn State may censor the content of AFS's commercial speech". *AFS v. Penn State, supra*, 688 F.2d at 912. It then proceeded to apply the *Central Hudson* analysis and although it did not find the governmental interests insignificant, it nevertheless concluded that, "(r)estrictions on the *contents* of the demonstration as

5. We recognize that Penn State, unlike SUNY, allowed an individual student to invite a sales representative to his or her room to individually complete the sale. This, however, has no bearing on our conclusion that the transaction itself is *conduct*, not *speech*.

distinguished from the conduct of the demonstration cannot further these interests." *Id.* at 907 (emphasis in original).

The Court then went on to consider a contention by the recently-added student plaintiffs, that even if AFS did not have a right to sell products at the conclusion of a demonstration, students had a First Amendment right to make such purchases. The Court rejected that claim easily, in view of its prior distinction between speech and conduct:

> Fairly read, the court in *American Future Systems* I sustained the validity of the distinction between the demonstration and the consummation of the transaction, and it did so after considering not only AFS's right to deliver the speech but the "students' rights to take part in the sale there".

AFS v. Penn State, 688 F.2d at 914.

Thus, the Third Circuit decisions support the proposition that only the informational portion of the AFS group product demonstration is protected by the First Amendment. However, it should be emphasized that we are not making a distinction, as Judge Muir tentatively did, between the "solicitation" and "informational" aspects of AFS's speech. In our view, all of the communicative aspects of AFS's demonstration are protected under *Central Hudson*. The distinction being made here, however is

between the dissemination of information by AFS, which is "speech", and the consummation of sales, which is not.

As might be expected, AFS regards the sales portion of its presentation as "absolutely crucial". *AFS v. Penn State, supra*, 618 F.2d at 254–55. Be that as it may, plaintiffs may not utilize the First Amendment protection accorded to the dissemination of information—which only recently has been extended to commercial information—to pave the way for commercial conduct which is not speech. If there is a right to conclude the transactions, it is found in a source other than the freedom of speech clause in the First Amendment.

VII.

It is contended by student-plaintiff Fox that the challenged regulation violates his rights of association and privacy, as well as his plaintiff Rapp's Fourth Amendment right to be free from unwarranted searches and seizures. Finally, all the plaintiffs maintain that the defendants have deprived them of due process by enforcing the regulation in an arbitrary ad capricious manner. Since the court has already determined that plaintiffs have shown a likelihood of establishing a First Amendment right to disseminate information about their products, it is only necessary to consider whether the

right to consummate sales transactions may be predicated on the constitutional clauses cited above. As the discussion below indicates, the Court finds that plaintiffs are unlikely to prevail on these contentions.

A.

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[17] Plaintiff Fox indeed enjoys a First Amendment right to associate with other persons of his choice, and where that association is purposeful, it is protected "whether the beliefs sought to be advanced pertain to political, economic, religious, or cultural matters". *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1959); *See, Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464, 99 S.Ct. 1826, 1827, 60 L.Ed.2d 360 (1979); *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

[18] Nevertheless, it is difficult to conceive of how the challenged regulation deprives Fox of his associational rights. *See, AFS v. Penn State, supra*. 510 F.Supp. at 987. The regulation does not restrain him from inviting any individual to his dormitory room. Indeed, if the prohibition is limited to commercial transactions, as opposed to commercial speech, then Fox may even invite persons to his room for the purpose of participating in a group product demonstration. The important point, however, is that SUNY is not restraining association, it is restraining conduct. The fact that AFS

may no longer desire to associate with Fox in his dormitory room if it is unable to sell cookware to him at that time does not, in our view, implicate First Amendment associational rights.

In its most recent decision, the Third Circuit did express concern that Judge Muir had not adequately considered "the students' associational and free speech rights in the activities in their dormitory rooms independently from the activities conducted in the common areas". *AFS v. Penn State, supra*, 688 F.2d at 915. It then specified the reason for its concern:

> The difficulty is that on this record we do not know whether there is a blanket prohibition against all organized group activity, and there have been no findings made by the district court as to the basis for such a prohibition.

Id. at 915. Clearly, a blanket prohibition on all group activity would implicate associational rights. However, nothing in the Third-Circuit's decision affords any basis for recognition of an associational right to consummate transactions.

B.

[19] Plaintiff Fox is also highly unlikely to prevail on his claim that the regulation impairs his right to privacy. That argument has been consistently and persuasively rejected in Pennsylvania. *AFS v. Penn*

State, supra, 688 F.2d at 915–916; *AFS v. Penn State, supra,* 522 F.Supp. at 553–54; *AFS v. Penn State, supra,* 510 F.Supp. at 987. In the most recent Third Circuit decision, the Court explained that the Supreme Court currently recognizes two types of privacy interests:

> "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions". The latter decisions have encompassed "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education". *Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976)

The Court then concluded that:

> . . . the intimate personal nature of the rights previously accorded privacy protection is a far cry from the right asserted here, the right to host and attend a demonstration of cookware. We are unwilling to extend the constitutional right of privacy to commercial transactions completely unrelated to fundamental personal rights and therefore affirm the district court's rejection of that basis of plaintiffs' claims.

Id. at 915–16. This Court adheres to the view expressed by the Third Circuit, and finds the privacy claim unlikely to be meritorious.

C.

Plaintiffs refer the Court to the events leading up to the arrest of Ms. Rapp on October 19, 1982, and contend that the conduct of the defendants violated the search and seizure clause of the Fourth Amendment. The claim is asserted by plaintiff Rapp and by plaintiff Fox, who maintains that he is "subject to the continuing threat of such unlawful search and seizure at the hands of the SUNY administration". *Plaintiffs' Brief* at 43. 770

It is unnecessary to address either the probable merit of the Fourth Amendment claim, or the troublesome collateral issues of standing, ripeness, and abstention. It need only be observed that the claim, even if meritorious, does not address the validity of the prohibition on commercial activity, and therefore does not furnish a ground for the injunctive relief sought in this motion.

D.

[20, 21] Finally, plaintiffs argue that the defendants are depriving them of liberty without due process by enforcing the regulation in an arbitrary and capricious manner. In particular, plaintiffs maintain that by allowing certain concerns to operate on campus, but not others, the defendants have acted with neither logic nor reason.

The Court fully appreciates that the "touchstone of due process is protection of

the individual against arbitrary action of government". *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Nonetheless, it is doubtful that plaintiffs will be able to establish such arbitrary action in this instance. The commercial enterprises which SUNY has excepted from its prohibition (i.e., those that "provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events") might reasonably be characterized "commercial activities which serve the essential and educationally-related needs of all students and which are beyond the capacity of the University to provide . . ." *Affidavit of Dr. Bristow* ¶ 6. The sale of cookware might reasonably be excluded from this category. Though one might argue over the inclusion or exclusion of any particular product or service, it by no means appears that the current formulation is "arbitrary or capricious".[6]

VIII.

As set forth above, plaintiffs have failed to demonstrate a likelihood of success on the merits with respect to their claim of a Constitutional right to consummate trans-

6. We also note that there is considerable doubt that plaintiffs can identify a specific "liberty interest" they have which the university if depriving them of without due process. *See, AFS v. Penn State, supra,* 522 F.Supp. at 555.

actions in dormitory rooms. Turning now to the alternative basis for a preliminary injunction, we hold that plaintiffs have also failed to establish "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief". *Jackson Dairy, Inc. v. H.P. Hood & Sons, supra,* 596 F.2d at 72. Plaintiffs' showing with respect to the latter portion of this requirement is particularly inadequate. It should suffice to observe that denial of injunctive relief merely maintains the *status quo* for the course of this litigation, and that none of the plaintiffs are being deprived of any opportunity that they have enjoyed previously, or have been led to expect would be forthcoming.

IX.

[22] The Court holds that (1) plaintiffs have shown a likelihood of success on the merits insofar as they claim a right to disseminate and receive commercial information through group product demonstrations conducted in the dormitory rooms of inviting students at SUNY-Cortland; (2) Plaintiffs have failed to show a likelihood of success on the merits insofar as they claim a right to consummate sales of products in the dormitory rooms of inviting students at SUNY Cortland, nor have they demonstrat-

ed other grounds for a preliminary injunction with respect to this claim.

The relief warranted by the Court's holding is as follows: [7]

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1. Pursuant to Rule 65, Fed.R.Civ.P., defendants are hereby enjoined, until further notice from this Court, from enforcing SUNY Resolution No. 66–156 as amended by 73–56 to the extent of barring plaintiffs from disseminating and receiving information in the course of group product demonstrations conducted in the dormitory room of an inviting student at SUNY-Cortland. Nothing in this Order shall restrain defendants from promulgating and enforcing reasonable restrictions governing the time, place, and manner of such demonstrations.

2. All other preliminary relief sought by plaintiffs is hereby denied.

IT IS SO ORDERED.

7. In *AFS v. Penn State, supra*, 553 F.Supp. 1268 (1982) Judge Muir granted a preliminary injunction, but limited it to permitting the one named student-plaintiff to host the demonstration. In Judge Muir's view, because the action was not brought on behalf of a class it was not necessary to award provisional relief to any but the prevailing named plaintiff. This court, however, has recognized a likelihood that all the plaintiffs, including AFS, enjoy certain commercial speech rights; and the injunctive relief is framed accordingly.

Memorandum-Decision and Order of McCurn, D.J., dated October 3, 1988.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, and AMERICAN FUTURE SYSTEMS, INC.,

Plaintiffs,

-v-

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., Individually and as Chancellor of the Board of Trustees and the State University of New York College at Cortland, and JAMES M. CLARK, Individually and as President of the College at Cortland, and the STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, Individually and as President of the State University of New York at Binghamton, and the STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, Individually and as President of the State University of New York at Albany, and the STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, Individually and as President of the College of Arts and Sciences at Potsdam,

Defendants.

82-CV-1363

Appearances:

Ronald H. Sinzheimer, ESQ., 8 Elk Street, Albany, NY 12207

Duane Morris & Heckscher, 1500 One Franklin Plaza, Philadelphia, PA19102

Henry T. Heath, Esq., Wayne A. Mack, Jr., Esq. of Counsel, Attorneys for Plaintiffs

Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendants The Capitol, Albany, NY 12224

Lawrence Doolittle, Assistant Attorney General of Counsel

Neal P. McCurn, D.J.

MEMORANDUM-DECISION AND ORDER

BACKGROUND

This is the third time this case has been before the court. Familiarity with the prior proceedings is presumed.[1] Nevertheless, a brief review of the background of the case is appropriate. American Future Systems, Inc. (AFS) sells cookware, china, crystal, and silverware to college students through group demonstrations. In 1982, one of AFS' representatives, Kathleen Rapp, was required by University officials to leave a dormitory room on the campus of the State University of New York (SUNY) at Cortland, even though she had been invited to give a demonstration by a student resident. Rapp's removal was due to the enforcement of SUNY Board of Trustees Resolution 66-156, as amended, which reads as follows:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

[1]See *American Future Systems, Inc. v. State University of New York at Cortland*, 565 F.Supp 754 (N.D.N.Y. 1983); *Fox v. Bd. of Trustees*, 649 F.Supp. 1393 (N.D.N.Y. 1986), rev'd, 841 F.2d 1207 (2d Cir. 1988).

In order to challenge the SUNY Resolution and its enforcement at SUNY-Cortland, AFS, Rapp, and Todd Fox, a student who wished to host an AFS demonstration, commenced this suit on December 2, 1982. AFS and Rapp asserted that the SUNY Resolution and its enforcement deprived them of their first amendment right to free speech. Fox claimed that the Resolution and its enforcement deprived him of his rights of privacy and association as well as free speech. Claims under the due process, equal protection and search and seizure clauses of the constitution were also asserted as were pendent claims under the constitution and laws of New York State.

Plaintiffs moved for an injunction permitting them to conduct their demonstrations at SUNY-Cortland without interference *pendente lite*. In a decision dated June 3, 1983, this court enjoined the University from prohibiting demonstrations in the dormitory rooms of a consenting SUNY Cortland student. *American Future Systems, Inc. v. State University of New York at Cortland*, 565 F.Supp. 754 (N.D.N.Y. 1983). The court presumed irreparable harm in that plaintiffs had alleged deprivation of their first amendment freedoms. *Id.* at 761. The court then concluded that plaintiffs were likely to prevail in their claim that the SUNY regulation and its enforcement unconstitutionally infringed on their first amendment freedoms. *Id.* at 761-67. In so doing, the court characterized the speech in question as commercial speech, and applied the commercial speech test of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the

> governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id. at 567.

Defendants did not contend that the group demonstrations were unlawful or deceptive, so the court found the first step of Central Hudson to be satisfied. *American Future Sys.*, 565 F.Supp at 763-64. The court also found the defendants proffered interests of (l) preventing disruption; (2) protecting the safety and security of the students; and (3) protecting students from commercial exploitation to be substantial. *Id.* at 764-65. The court determined, however, that the complete ban only directly advanced interest numbered (3); and, in any event was more extensive than necessary to serve that interest. *Id.* at 765-67.

Although the court determined that under *Central Hudson*, the plaintiffs were likely to succeed on their claims that SUNY had violated their first amendment freedom to disseminate and receive commercial information, it determined that the consummation of commercial transaction was not so protected. *Id.* at 767-68. Moreover, the court determined that while the defendants could not bar group demonstrations completely, they could enforce reasonable restrictions governing the time, place and manner of such demonstrations. *Id.* at 771. Accordingly, the court's Order enjoined defendants from enforcing Resolution 66156 to the extent that it barred the plaintiffs from disseminating and receiving information in the course of group product demonstrations conducted in the dormitory room of an inviting student at SUNY-Cortland. It did not, however, enjoin defendants from prohibiting consummation of sales, nor from enforcing reasonable time place and manner restrictions.

In response, SUNY-Cortland promulgated regulations which prohibited the consummation of all sales on campus; restricted AFS presentations to certain hours; confined the presentations to student rooms; limited the number of student participants to ten; and required a registration procedure, which called for, among other things, the unanimous consent of all residents assigned to

the room.[2] Plaintiffs amended their complaint to challenge both 66-156 and the Cortland regulations.[3]

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[2]The complete SUNY-Cortland "interim" regulations are set forth below:

> COMMERCIAL PRESENTATIONS bY
> REPRESENTATIVES OF AMERICAN FUTURE
> SYSTEMS, INC.
>
> The following regulations are established in accordance with the June 3, 1983 preliminary injunction Order entered by the Honorable Neal P. McCurn, U.S. District Judge for the Northern District of New York pending final determination in the *American Future Systems, Inc., et al. v. State University of New York College at Cortland, et al.* case.
>
> Where a student residing in College housing elects to invite an American Future Systems, Inc. representative into his/her room to conduct, host or participate in a commercial presentation, such presentation will be allowed only in accordance with the regulations outlined below. No commercial activity involving the consummation of sales will be allowed on the College premises. CONSUMMATION OF SALES SHALL INCLUDE ACTIVITY SUCH AS THE TRANSFER OF CASH, CHECKS OR MONEY ORDERS IN EXCHANGE FOR PRODUCTS; THE USE OF CREDIT CARDS FOR THE PURCHASE, LEASE OR RENTAL OF PRODUCTS, AND/OR ENTERING INTO AGREEMENTS (EITHER WRITTEN OR ORAL) FOR THE PURCHASE, LEASE OR RENTAL OF PRODUCTS. If violations occur in relation to this sales prohibition and/or compliance with these regulations, the resident who issued the invitation and all other residents involved may be subject to appropriate disciplinary action. American Future System, Inc.'s representative(s) may be subject to ejectment and may also be excluded from further entry into College premises.

(Footnote continued on following page)

A non-jury trial was held in the Fall of 1986, and this court issued its findings of facts and conclusions of law on December 12, 1986. *Fox v. Bd. of Trustees*, 649 F.Supp. 1393 (N.D.N.Y. 1986), rev'd 841 F.2d 1207 (2d Cir. 1988). After reviewing the evidence, the court concluded that its preliminary determination that the speech involved was commercial speech and not pure speech was substantiated by the record. *Id.* at 1397-98. The court did not apply the *Central Hudson* test, however. Relying on

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(Footnote continued)

TIME

Commercial presentations given by invited American Future Systems, Inc. representatives will be limited to certain hours. During the year when residence halls are open to students, such presentations are permitted between 2:00 and 9:00 P.M. except during exam periods, when they conflict with study hours established by individual residence hall governance committees.

PLACE

No commercial presentations by American Future Systems, Inc. representative(s) are allowed in common areas of the residence halls. Only presentations in student rooms-with written permission from all roommates/suitemates and in accordance with stated rules and regulations governing such presentations-will be permitted. The number of participants will be limited to ten (10).

MANNER

Commercial presentations by American Future Systems, Inc. representatives will be allowed if they are by resident invitation and if a registration form is satisfactorily completed. All information and signatures requested on the registration form must be provided and submitted to the Director of Residence Life or designee by 12:00 P.M. (Noon) of the working day *prior* to the presentation.

The resident who has invited the American Future Systems, Inc.'s representative into the residence hall to give a presentation is responsible for the conduct of his/her guest and must be present during the duration of the visit.

[3]Other amendments were also made. The Presidents of SUNY-Albany, SUNY-Binghamton and SUNY-Potsdam were named defendants. Several student plaintiffs were added or dropped as their matriculation at the various state colleges changed. Kathy Rapp was also dropped as a plaintiff.

several decisions that had been announced since the preliminary injunction motion in 1983, the court determined that the public forum analysis was appropriate. *Id.* at 1398-1400 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37 (1983); *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986); *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985); *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984), *cert. denied*. 471 U.S. 1004 (1985); *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854, 870-71 (3d Cir. 1984) (Adams, J., concurring), *cert. denied*, 473 U.S. 911 (1985). Because SUNY permitted social, cultural, and educational activities in dormitories while prohibiting commercial activities, the court concluded that dormitory rooms constituted public fora for social, cultural and educational activities, but non-public fora for commercial activities. *Fox*, 649 F.Supp. at 1400-1401. The court then determined that Resolution 66-156 was a reasonable, viewpoint neutral restriction on commercial speech in a limited public forum, and dismissed the complaint. *Id.* at 1401-1402. Since the court found the complete ban to be a constitutional restriction on speech, it declined to consider the claims in regard to the interim Cortland regulations. *Id.* at 1402.

The United States Court of Appeals for the Second Circuit has reversed and remanded. *Fox v. Bd. of Trustees*, 841 F.2d 1207 (2d Cir. 1988). The Court of Appeals rejected this court's use of the public forum analysis noting that between trial and appeal "the focus of the case shifted" because AFS had dropped out as a party. *Id.* at 1208. The Court determined that:

> "[s]ince this case no longer involves the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights, the public forum cases thought applicable by the district court are inapposite."

Id. at 1212. The Court then determined that the appropriate test to apply was the commercial speech test of *Central Hudson*. *Id.* at 1213.

Although the Court remanded the case for application of the *Central Hudson* test, it did so with some guidance. First, the Court agreed with this court's preliminary determination that AFS demonstrations concerned lawful activity and were not misleading, and that the proffered state interests of SUNY were substantial. *Fox*, 841 F.2d at 1213. Second, the court determined that the real inquiry on remand was whether the regulation directly advanced the State's interests, and if so, was not more extensive than necessary to further those interests. *Id.* at 1213-14. Third, the court determined that *Central Hudson's* "not more than necessary" language requires that the regulation be the "least restrictive means" for serving the governmental interests. *Id.* at 1213-14.

DISCUSSION ON REMAND

The first task on remand is to apply the last two steps of the *Central Hudson* standard to Resolution 66-156 in light of the facts developed at trial. The court must determine: (1) whether Resolution 66-156 directly advances the State's interests of preventing crime on campus, protecting students from consumer exploitation, and preserving tranquility in the dormitories; and, (2) whether the Resolution is the least restrictive means for achieving those goals. Applying these tests there can be no question that Resolution 66-156 does not pass constitutional muster. Assuming, but not concluding, that the Resolution directly advances the State's interests, it is indisputable that it is not the least restrictive means for advancing those interests. As noted in this court's most recent opinion in this case, plaintiffs offered expert testimony that other means, less restrictive than a total ban on commercial activity, had been implemented at least one comparable university. *Fox*, 649 F.Supp. at 1401-1402. Defendants, on the other hand, offered no credible testimony as to why similar tailoring could not be accomplished at SUNY. Resolution 66-156 is overbroad, and is not the least restrictive

means for meeting the proffered state interests. *See also American Future Sys*, 565 F.Supp. at 765-67.[4]

Having determined that Resolution 66-156 is unconstitutional, the court must now turn to plaintiffs challenge of the interim regulations of SUNY-Cortland.[5] Of course these regulations must also directly advance the State's interests and be the least restrictive means for doing so.[6] SUNY offered considerable uncontradicted testimony for the proposition that the regulations directly advance at least their interests in preventing crime and insuring tranquility on campus. Several SUNY administrators, including Dr. O'Leary, Dr. Murabito, and Mr. Franco, Vice-President for Student Affairs at SUNY-Cortland, testified that limiting access to the dormitories and keeping track of visitors provided a mechanism for maintaining tranquility and deterring crime. The interim regulations do limit access to the dormitories in that demonstrations are permitted only during certain hours and are restricted during examination times. These restrictions are directly related to the University's desires to provide a peaceful place for students to study. Moreover, the interim regulations require sales personnel to register prior to their visit. Such a registration procedure is directly related to the University's interest in deterring crime.

The more telling question, however, is whether the interim regulations are the least restrictive means for advancing the

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[4]The facts presented at trial were not substantially different than those presented to the court on the preliminary injunction motion. This court's application of the *Central Hudson* test on the preliminary injunction motion provides further support, therefore, for the conclusion that resolution 66-156 is an unconstitutional infringement on the plaintiffs' first amendment rights.

[5]See *supra* note 2 and accompanying text.

[6]In the decision on the preliminary injunction motion, this court commented that "reasonable" time, place and manner restrictions would be appropriate. The Second Circuit Court of Appeals has, however, mandated that the regulations be the "least restrictive" means available to achieve the states' goals. The State's burden is obviously much more onerous in this regard.

governmental interests. "If the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Fox v. Bd. of Trustees*, 841 F.2d at 1214, citing *Central Hudson*, 447 U.S. at 564. It is incumbent upon the government to demonstrate that its interests cannot be protected adequately by a more limited regulation. 447 U.S. at 570. SUNY has not done so here. SUNY offered the testimony of only one witness who was involved with the formulation of the interim regulations: Raymond D. Franco, Assistant Vice-President for Student Affairs at SUNY-Cortland. Mr. Franco offered no testimony that a less restrictive regulation could not serve the interests of the State. In fact, Mr. Franco admitted that a less restrictive, though more expensive, manner for insuring student safety and tranquility in the form of a visitor checkpoint at every dormitory was available.[7] Moreover, no other defense witness testified that less restrictive regulations would fail the University's purpose. On the other hand, plaintiffs offered the testimony of Mr. Howard Diamond, Special Assistant to the Chancellor at the University of Illinois, Urbana-Champaign. Mr. Diamond testified that his University shared the same interests as SUNY. But, it has accommodated those interests in a manner less restrictive than the interim regulations. It has prohibited commercial activities in the dormitories, except that students are permitted to invite salesmen into their rooms if they so choose. Once such an invitation is made, the commercial visitor is treated no differently than any other visitor. Defendants offered no testimony as to why a similar policy would not

[7]Franco did explain that even though this method was available, it was not used because of its higher cost, which had to be passed on to students. This court, in its last opinion, considered that rationale to be entirely reasonable. The Second Circuit has mandated, however, that the restriction need be the least restrictive, not just "reasonable." Under such an approach, cost is immaterial.

advance the interests of SUNY. Accordingly, the interim regulations also fail the fourth prong of the *Central Hudson* test.[8]

Both Resolution 66-156, as amended, and the interim regulations are hereby declared unconstitutional infringements on plaintiffs first amendment rights.[9]

IT IS SO ORDERED.

DATED: October 3, 1988
Syracuse, NY

NEAL P. McCURN
Chief U.S. District Judge

[8]plaintiffs made other arguments regarding the interim regulations. For example, they argued that providing separate treatment for AFS was an unconstitutional infringement on AFS' right to equal protection. As the interim regulations are invalid under Central Hudson. as interpreted by the Second Circuit, the court need not reach these other arguments.

[9]The plaintiffs' Verified Amended Complaint sought declaratory relief. It did not seek an injunction. It also sought reasonable attorneys fees and costs. Such an application, if made, will be entertained separately.

Verified Amended Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHEASTERN DISTRICT OF NEW YORK

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAINO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GRAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, and AMERICAN FUTURE SYSTEMS, INC.,

Plaintiffs,

against

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Defendants.

(Judge McCurn)

No. 82-CV-1363

The individual student plaintiffs bring this suit to enjoin defendants from enforcing policies and regulations that deprive them of their constitutional rights. Specifically, these students desire to have the right, without interference or censorship by defendants, to invite a commercial invitee of their choosing to their dormitory rooms on a one-on-one basis, or alternatively, to host and/or attend, in the privacy of their own or another student's dormitory room, a meeting to discuss with a business invitee such topics as the students, in the exercise of their own free choice, decide that they want to participate in. Without limitation to the foregoing, each student also desires to host and/or attend an AFS demonstration. Defendants' actions enforcing the policies and regulations at issue violate their non-commercial rights of free speech and association as well as their commercial free speech rights stemming from the AFS activity.

Plaintiff, AFS, is a private enterprise engaged in the retail sale of high quality table china, tableware crystal, and cookware through the presentation of educational and informative group demonstrations of its merchandise to young people at colleges and universities nation-wide. It brings this action to enjoin defendants from enforcing policies and regulations that deprive it of its constitutional right to equal protection of the laws. It brings this action also to compel the defendants to permit it the full enjoyment and exercise in the residence halls at the defendant-colleges of the commercial free speech rights it derives from the rights of the student plaintiffs.

Notwithstanding any rule or regulation of the schools to the contrary, plaintiffs have rights guaranteed them under the United States Constitution to lawfully engage in the foregoing activities. In support of their request for declaratory and equitable relief, plaintiffs state the following:

PARTIES

1. Plaintiff, Todd Fox, is a citizen of the United States and was a student enrolled at SUNY-Cortland, in the City of Cortland, County of Cortland, State of New York.

2. Plaintiff, Edward R. Detweiler, is a citizen of the United States; he is a student at SUNY-Cortland and he resided at one time in Randall Hall, but is now living off-campus. He is the Vice President of the Student Government at SUNY-Cortland.

3. Plaintiff, Stephanie Vaiano, is a citizen of the United States; she is a student at SUNY-Cortland and is residing at 15 Cheney Hall.

4. Plaintiff, James B. Cullen, is a citizen of the United States; he is a student at SUNY-Cortland and is residing at Casey Tower.

5. Plaintiff, Christine Marie Odell, is a citizen of the United States; she is a student at SUNY-Cortland and is residing at 234 Hendrick Hall.

6. Plaintiff, Steven Gawley, is a citizen of the United States; he is a student at SUNY-Albany and he resided at one time in Eastman Tower, but is now living off-campus. He is the President of the Student Government at SUNY-Albany.

7. Plaintiff, Daniel Altman, is a citizen of the United States; he is a student at SUNY-Albany and he resided at one time in Eastman Tower, but is now living off-campus.

8. Plaintiff, Philip Jay Botwinik, is a citizen of the United States; he is a student at SUNY-Albany and is residing at Cooper Hall.

9. Plaintiff, Jaclyn Bernstein, is a citizen of the United States; she is a student at SUNY-Albany and is residing at Indian Quad, Mohawk Estates.

10. Plaintiff, AFS, is a business incorporated under the laws of the Commonwealth of Pennsylvania and having its principal place of business at 715 Lancaster Avenue, Bryn Mawr, PA 19010.

11. Defendant, the Board of Trustees of the State of New York ("Board of Trustees") is the body established by the State of New York with ultimate overall authority and responsibility for the operation of the SUNY system, including the defendant-schools.

It consists of 16 members who are appointed by the Governor of the State of New York.

12. Defendant, Clifton R. Wharton, Jr., Chancellor of the Board of Trustees, is responsible for the day-to-day operation of the University. He is a citizen of New York State and his office is located at the State University Plaza, Albany, New York 12246.

13. Defendant, SUNY-Cortland, is an institution of higher education established in 1868 which is funded by the State of New York. The College is located in the County of Cortland, New York, and is one of 64 campuses within the SUNY System, which is a public, tax supported institution that was established in 1948.

14. Defendant, James M. Clark, is the President of SUNY-Cortland. As such, he is the Chief Administrative Officer at the College and he has final authority to establish and implement policy concerning student affairs. He is a citizen of New York State residing in, upon information and belief, the City and County of Cortland, State of New York.

15. Defendants, the State University of New York at Binghamton ("SUNY-Binghamton") and the State University of New York at Albany ("SUNY-Albany") are university centers within the State University system. The College of Arts and Sciences at Potsdam ("Potsdam") is a college within the State University system.

16. Defendants, Humphrey Tomkin, Vincent O'Leary, and Clifford D. Clark, are Presidents, respectively, at Potsdam, SUNY-Albany, and SUNY-Binghamton. As such, they are the Chief Administrative Officers at their respective colleges and they have final authority to establish and implement policy concerning student affairs.

JURISDICTION

17. This is an action for declaratory and injunctive relief which arises under the Constitution of the United States and under Federal Civil Rights law, 42 U.S.C. §1983. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

18. Jurisdiction is predicated upon 28 U.S.C. §§1331 and 1343.

19. Plaintiffs' claim for declaratory relief is brought pursuant to 28 U.S.C. §§2201 and 2202.

FACTUAL BACKGROUND

20. Resolution 66-156 of the Board of Trustees, as amended by Resolution 73-26 provides:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, campus bookstore, laundry, dry cleaning, barber and beauty services, and cultural events.

21. Pursuant to this policy, as applied and enforced by SUNY, students on SUNY campuses are prohibited from inviting into their dormitory rooms anyone who provides a product or a service where the end result is the making of profit by the invitee; the policy represents a total ban on all such activity.

22. The policy applies regardless of the number of invitations that a student makes or that an invitee receives; a single, isolated invitation/visit triggers application of the ban.

23. The policy applies even when the activity involves informational, educational, and/or social as well as commercial aspects.

24. The policy applies regardless of the motivation for the invitation; a student wishing only to obtain information and having no intention of buying anything is prohibited from inviting a business representative into his room to the same extent as a student whose motivation is solely commercial.

25. The policy applies without regard to the truth or falsity or potential deceptiveness of the information provided by the invitee with respect to his product or service.

26. The policy does not distinguish between solicited and unsolicited commercial activity.

27. Pursuant to this policy, students on SUNY campuses have been prohibited from inviting any business invitee, including AFS representatives, into their rooms.

28. All the student plaintiffs desire to have the right, without interference or censorship by SUNY, to invite a commercial invitee of their own choosing to their dormitory rooms on a one-on-one basis, or alternatively, to host and/or attend, in the privacy of their own or another student's dormitory room, a meeting to discuss with a business invitee such topics the students, in the exercise of their own free choice, decide that they want to participate in. Without limitation to the foregoing, each student plaintiff also desires to host and/or attend an AF5 demonstration (see allegations in Paragraphs 42-45).

29. Plaintiff, Todd Fox, while a resident student at SUNY-Cortland, sought and was denied permission to host and participate in a group sales demonstration in the privacy of his dormitory room.

30. Plaintiff, Fox, desiring to host an AFS group demonstration in his dormitory room, sent a letter to the appropriate Administration official on November 4, 1982, stating his intention to host such a demonstration on November 5, 1982 (copy attached to original Complaint as Exhibit "B"). Fox was informed that he could not host said demonstration because it was prohibited by SUNY policy and regulations (copy attached to original Complaint as Exhibit "C"). As a result of this response, Fox did not hold a group presentation in his room.

31. The position and acts of Administration officials at SUNY-Cortland, were formulated and/or enforced at the direction of, and/or with the consent and acquiescence of, defendants Clark, Wharton, and the Board of Trustees. At all relevant times, the above-named defendants purported to act pursuant to the rules, regulations and policies of SUNY and the College at Cortland.

32. A motion for preliminary injunction seeking to enjoin the above acts was filed in the United States District Court at the U.S. Courthouse in Syracuse, New York before the Honorable Neal P. McCurn.

33. After examining the SUNY policy, this Court, by its Order and Opinion of June 3, 1983, enjoined the defendants from enforcing the policy insofar as it barred the presentation of product demonstrations in dormitory rooms at SUNY-Cortland.

34. In the wake of this Court's decision of June 3, 1983, SUNY-Cortland adopted new regulations, which purport to be reasonable time, place and manner restrictions on demonstrations by AFS.

35. These regulations were amended on or about September 4, 1984.

36. As amended, the regulations violate plaintiffs' Constitutional rights as well as this Court's requirement that any such restrictions governing demonstrations be reasonable as to time, place and manner.

37. Specifically, the regulations are objectionable as follows:

(a) The regulations apply only to AFS' activities rather than to all commercial speech and commercial activity. As such, the policy is discriminatory and denies AFS its right to equal protection of the laws.

(b) The provision that purports to bar commercial activity involving the consummation of sales is overbroad, ambiguous, and susceptible of interpretation to preclude lawful exercise of the students' First amendment rights and as applied violated the rights of AFS to equal protection of the law.

(c) The time for making the presentations is unreasonably limited to the hours 2:00 P.M. to 9:00 P.M.

(i) the regulation as to time is improper in that it arbitrarily and capriciously imposes a time period different from that applicable to other guests in the residence halls.

(ii) the visiting time period may be further restricted when it conflicts with "study hours."

(d) it is the position of the plaintiffs that reasonable time regulations regarding AFS presentations within the residence halls should be identical to visiting hours for all persons other than dormitory residents.

(e) The regulation as to manner is unreasonable and represents a prior restraint on plaintiffs' First Amendment rights by requiring written permission for a presentation to be obtained by 12:00 P.M. (noon) of the working day prior to the presentation and by further requiring a form describing the content of any presentation.

(i) the regulation requiring the approval of content represents a prior restraint on free speech, constitutes an unreasonable regulation not applicable to other (including commercial) visitors, and is arbitrary and capricious.

(ii) the regulation also represents an harass ment technique by the defendants against the plaintiff, AFS. Because the defendant, SUNY Cortland, is well aware from this action alone of the content of an AFS presentation, the requirement that each host student obtain such information and thereafter fill out a form can serve no purpose other than to unlawfully hinder the activities of AFS and infringe upon its constitutionally guaranteed rights. The written notice requirement, which is not applicable to other (even commercial) visitors, similarly serves no useful purpose, is discriminatory and unreasonable, and constitutes an harassment technique used by the defendants against plaintiffs in this action.

38. SUNY-Binghamton, SUNY-Albany, and Potsdam are within the State University System. As such, the above-referenced university centers and college are subject to SUNY Resolution No. 66-156, as amended by Resolution 73-56, which impermissibly bars plaintiffs from pursuing their non-commercial free speech rights as well as their commercial free speech rights on their respective campuses.

39. On April 15, 1984 this Court extended its Preliminary Injunction Order of June 3, 1983, making it applicable to SUNY-Albany, SUNY-Binghamton, and Potsdam as well as to SUNY-Cortland.

40. Plaintiff, AFS, has attempted to present demonstrations pursuant to the invitation of student hosts and in accordance with standard AFS policies and practices at these SUNY facilities but has been denied access to the respective campuses and dormitories.

41. By reason thereof, AFS has been denied its derivative commercial free speech rights and has suffered damage.

42. Plaintiffs, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, and Christine Marie Odell have interests similar to those of Plaintiff, Todd Fox. In addition to their desire to meet with any invitee of their choosing as alleged in paragraph 28 above, they also wish to attend or host an AFS demonstration. They know about the prohibition of the Board of Trustees' Resolution and the restrictions applicable to such demonstrations at SUNY-Cortland, and contend that the stated policy and the current restrictions violate their constitutional rights, and therefore, seek an Order of this Court protecting their rights.

43. Plaintiffs, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan and Jaclyn Bernstein also have interests similar to those of plaintiff, Todd Fox. They wish to attend or host an AFS presentation. They know about the prohibition against such activities at SUNY-Albany, contend that such a prohibition violates their constitutional rights, and, therefore, seek an Order of this Court protecting their rights.

44. As a result of said acts by defendants, and each of them, plaintiffs have been deprived of their rights to freedom of speech under the First Amendment to the United States Constitution as well as their rights to equal protection of the laws under the Fourteenth Amendment to the Constitution.

45. Plaintiffs have suffered and, unless immediate relief is granted, will continue to suffer, serious and irreparable injury for which plaintiffs have no adequate remedy at law.

46. Plaintiff, AFS, is a private enterprise engaged in the retail sale of high quality cookware, china, crystal and tableware throughout the U.S.A.

47. AFS, through its "American Prestige Series" division, specializes in quality service to college students. The unique services offered to college students by AFS include better quality products, greater access to credit, lower interest rates, more extensive guarantees, a more liberal exchange policy and lower prices than are otherwise available to college students. Such services are provided to college students through demonstrations of AFS merchandise to groups of young people on campus upon the invitation of a student resident. Such demonstrations provide students with valuable educational information concerning AFS products, other similar products, and relevant comparative prices. The demonstrations are a forum for the expression and exchange of views and ideas on these matters by the students themselves, as well as an opportunity to observe and learn first-hand about group selling practices. All activities engaged in during the course of the demonstrations are entirely lawful and non-disruptive.

COUNT I

Student Plaintiffs' Pure Free Speech Rights

48. The allegations of Paragraphs 1 through 47 are incorporated herein by reference.

49. By enforcing Resolution 66-156 as amended, which purports to exclude from residence halls all persons seeking to demonstrate or sell a product or service, including AFS and its representatives, defendants have violated the non-commercial, pure free speech rights of the student plaintiffs, guaranteed to them by the Constitution of the United States, to participate in such activities and to receive the educational, cultural and social benefits thereof.

COUNT II

Student Plaintiffs' Commercial Speech Rights

50. The allegations of Paragraphs 1 through 47 are incorporated herein by reference.

51. By enforcing Resolution 66-156 as amended, defendants have violated the commercial free speech rights of the student plaintiffs, guaranteed to them by the Constitution of the United States, to speak with and listen to a business invitee with the intent to make a purchase.

COUNT III

AFS' Derivative Commercial Speech Rights

52. The allegations of Paragraphs 1 through 47 are incorporated hereby by reference.

53. By enforcing Resolution 66-156 as amended, defendants have violated the commercial free speech rights of AFS and its representatives, which are derived from the rights of the student plaintiffs as invitors and guaranteed to them by the Constitution of the United States, to accept a student invitation and present a demonstration of their products.

COUNT IV

AFS' Equal Protection Claim

54. The allegations of Paragraphs 1 through 47 are incorporated herein by reference.

55. By enforcing the SUNY-Cortland interim regulations as amended, defendants have deprived AFS and its representatives of their rights to equal protection of the laws pursuant to the Fourteenth Amendment of the United States Constitution.

COUNT V

Student Plaintiffs' Equal Protection Claims

56. The allegations of Paragraphs 1 through 47 are incorporated herein by reference.

57. By enforcing the SUNY-Cortland interim regulations as amended, defendants have deprived the student plaintiffs of their rights to equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution.

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief:

(a) declare that the rules, regulations, policies, and practices of defendants, as described above, are void and unconstitutional as promulgated and/or written and as applied to plaintiffs.

(b) award reasonable attorneys' fees to plaintiffs.

(c) such other relief as the Court deems just and proper.

Respectfully submitted,

RONALD H. SINZHEIMER
Attorney for Plaintiffs
23 Elk Street
Albany, NY 12207

Henry T. Reath
DUANE, MORRIS & HECKSCHER,
of counsel
1500 One Franklin Plaza
Philadelphia, PA 19102

COMMONWEALTH OF:
: SS.
COUNTY OF :

AFFIDAVIT

Ronald H. Sinzheimer, Esquire, being duly sworn according to law, deposes and says that he is attorney for plaintiffs in this action and that the facts set forth in the foregoing Amended Complaint are true and correct to the best of his knowledge, information and belief.

s/Ronald H. Sinzheimer

Sworn to and subscribed
before me this day
of January 1986.

s/

Notary Public

Answer to Complaint as Amended January 7, 1986

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

AMERICAN FUTURE SYSTEMS, INC., KATHLEEN RAPP, *et al.*,

Plaintiffs,

against

THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, *et al.*,

Defendants.

(Judge McCurn)

82-CV-1363

Defendants, for their answer to the complaint as amended on January 7, 1986, respectfully allege:

FIRST: Admit the allegations contained in paragraphs 31, 34 and 35 of the complaint.

SECOND: Upon information and belief admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the complaint are accurate as of January 7, 1986.

THIRD: Deny the allegations contained in the first unnumbered paragraph of the complaint and in paragraphs 36, 37, 38, 41, 44, 45, 49, 51, 53, 54, 55 and 57 of the complaint.

FOURTH: Deny that the allegations in paragraphs 21, 22, 23, 24, 25, 26, and 27 of the complaint contain an accurate description of State University policy.

FIFTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17, 18, 19, 28, 40, 42, 43, 46 and 47 of the complaint.

SIXTH: Deny the allegations contained in paragraphs 11, 12, 13 and 15 of the complaint and affirmatively allege that the State University of New York was created by Article 88 of the New York State Education Law (§§ 350 *et seq.*) and that statute is the best evidence of the content and meaning thereof and of the authority and responsibilities of the State University of New York, its officers and employees.

SEVENTH: Admit the allegations contained in paragraphs 14 and 16 of the complaint to the extent that they allege that the defendants, James Clark, Humphrey Tomkin, Vincent O'Leary and Clifford Clark are presidents of SUNY Cortland, Potsdam, Albany and Binghamton respectively and deny the remaining allegations in paragraphs 14 and 16 of the complaint.

EIGHTH: Deny the allegations contained in paragraphs 20, 29, 30, 32, 33 and 39 of the complaint and affirmatively allege that the documents referred to therein are the best evidence of the content and meaning thereof.

NINTH: Iterate the same responses heretofore given to the individual paragraphs incorporated by reference in paragraphs 48, 50, 52 and 56 of the complaint.

FIRST DEFENSE:

TENTH: The amended complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE:

ELEVENTH: With respect to plaintiff American Future Systems, Inc., the amended complaint fails to state any claim upon which relief may be granted. The activities of that plaintiff, as described in the amended complaint, involve commercial conduct, not speech. That is, plaintiffs seek not to assert a right to free speech but, rather, seek to compel a right to engage in specified commercial conduct. There is no constitutional or other right to conduct commercial activities in public facilities and in University dormitories or residence halls in particular.

TWELFTH: The claims advanced by student plaintiffs as claim numbers 1 and 2 in the amended complaint are essentially identical and similarly fail to state a claim. In essence, student plaintiffs claim a constitutional right to conduct a retail business in their residence hall rooms. Student plaintiffs have no constitutional or other right to utilize University premises and residence halls or dormitory rooms, in particular, for private commercial enterprise.

THIRD DEFENSE:

THIRTEENTH: The regulations and policies of the State University of New York which prohibit commercial activities on University property and in University residence halls in particular do not affect or violate the plaintiffs' right of free speech under the United States Constitution.

FOURTH DEFENSE:

FOURTEENTH: If the conduct of commercial activities by plaintiffs did involve plaintiffs' First Amendment right to free speech, University residence halls and dormitory rooms are not a public forum, and the University's prohibition against the commercial activities, as carried out by the plaintiffs, does not infringe upon plaintiffs' constitutional rights.

FIFTH DEFENSE:

FIFTEENTH: If a University dormitory room or residence hall was a public forum, the proposed activities of the plaintiffs herein involve commercial speech which is constitutionally subject to regulation and prohibition by the State.

SIXTEENTH: There is a substantial State interest in excluding commercial enterprise and activities from the premises and residence halls of the State University of New York.

SIXTH DEFENSE:

SEVENTEENTH: The State University of New York's prohibition against commercial activities on campus and in University residence halls in particular is a statewide policy which does apply to all persons and which policy is applied in a uniform and consistent manner. This University policy does not, therefore, violate plaintiffs' right to equal protection. Since plaintiffs have no right of any kind to use University premises or property for private commercial activities, this policy does not violate plaintiffs' right to due process or any other right of plaintiffs.

SEVENTH DEFENSE:

EIGHTEENTH: The use of State University property, including residence halls, for private commercial activities is prohibited by the New York Constitution, Article VII, § 8.

EIGHTH DEFENSE:

NINETEENTH: This proceeding is barred by both the Tenth and Eleventh Amendments to the United States Constitution.

NINTH DEFENSE:

TWENTIETH: The Court is without subject matter jurisdiction of this proceeding at those campuses of the State University where no student who resides in a University dormitory is a plaintiff in that there is no case or controversy upon which the Court may rule.

TENTH DEFENSE:

TWENTY-FIRST: The plaintiffs who are not both students and residents of the State University of New York dormitories lack standing to maintain this proceeding.

ELEVENTH DEFENSE:

TWENTY-SECOND: Those plaintiffs who are not both students and residents of the State University of New York dormitories fail to state a claim upon which relief may be granted.

TWELFTH DEFENSE:

TWENTY-THIRD: The claims advanced as counts 4 and 5 in the complaint fail to state a claim upon which relief may be granted since those regulations apply to the activities of the American Future Systems, Inc. only, solely because that plaintiff is the only entity granted the protection afforded by the preliminary injunction previously issued by this Court since only American Future Systems, Inc. is afforded relief pursuant to that injunction. The application of the interim regulations promulgated pursuant to the authority given to the defendants in this Court's decision and order of June 3, 1983 does not constitute in any respect a denial of equal protection of the law or any other constitutional right of the plaintiffs herein.

WHEREFORE, defendants respectfully request a judgment dismissing the amended complaint in all respects and awarding them their attorney's fee pursuant to 42 USC § 1988, together with such other relief as to the Court may seem proper in the premises.

DATED: January 27, 1986
Albany, New York

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

LAWRENCE L. DOOLITTLE, ASSISTANT
Attorney General, of counsel
Telephone: 518 474-2234

STIPULATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

TODD FOX, *et al.*,

Plaintiffs,

against

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Defendants.

82-CV-1363

(Judge McCurn)

IT IS STIPULATED AND AGREED by and between all parties in the above case, by their respective attorneys, as follows:

1. Defendants are the individual members of the Board of Trustees of the State University of New York. The Board of Trustees is designated by state law as the governing body with overall authority for the operation of the State University of New York ("SUNY") system. SUNY is a public, tax-supported institution, established in 1948 as a multi-campus system, consisting of 64 campuses.

2. Defendant Clifton R. Wharton, Jr., Chancellor of the State University of New York, is responsible for the administration of the SUNY system. He is a citizen of New York State and his office is located at the State University Plaza, Albany, New York 12246.

3. Defendant Dr. James Clark is the president of the State University of New York College at Cortland ("SUNY-Cortland"), an institution of higher education located in the County of Cortland, New York. James M. Clark, as such, is the Chief Administrative Officer at the College and has final authority to establish and implement policy concerning student affairs, subject to various policies and guidelines of the State University of New York. He is a citizen of New York State, residing in the City and County of Cortland in the State of New York.

4. Defendants Vincent O'Leary and Clifford D. Clark are presidents, respectively at the State University of New York at Albany ("SUNY-Albany") and the State University of New York at Binghamton ("SUNY-Binghamton"). As such, they are the Chief Administrative Officers at their respective university Acenters and they have final authority to establish and implement policy concerning student affairs, subject to various policies and guidelines of the State University of New York.

5. Resolution 66-156 of the Board of Trustees of the State University of New York was enacted in 1966.

6. Resolution 66-156 of the Board of Trustees of the State University of New York was amended by Resolution 73-26 in 1973, and b[illegible]esolution 79-100, adopted May 23, 1979.

7. Resolution 66-156 of the Board of Trustees of the State University of New York, as amended by Resolution 73-26 and Resolution 79-100 provides, *inter alia*, as follows:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events."

8. SUNY-Cortland, SUNY-Binghamton and SUNY-Albany, as campuses within the SUNY system, are subject to the State University of New York policy established by Resolution 66-156 of the Board of Trustees, as amended by Resolution 73-26 and Resolution 79-100.

9. Pursuant to Resolution 66-156 of the Board of Trustees, as amended by Resolution 73-26 and Resolution 79-100, and as applied and enforced throughout the SUNY system, students on SUNY campuses are prohibited from inviting into their dormitory rooms commercial enterprises which furnish information, provide a product or a service where the end result is the intent to make a profit by the invitee.

10. Pursuant to Resolution 66-156 of the Board of Trustees as amended by Resolution 73-26 and Resolution 79-100, defendants James Clark (SUNY-Cortland), Clifford Clark (SUNY-Binghamton) and Vincent O'Leary (SUNY-Albany) deny American Future Systems, Inc. ("AFS") access to present sales demonstrations at the invitations of student hosts in their dormitory rooms.

11. A true and correct copy of the interim regulations established at SUNY-Cortland, following the June 3, 1983 preliminary injunction order entered by the Honorable Neal McCurn, as amended, are attached hereto as Exhibit "A".

12. Plaintiff Todd Fox, while a resident student at SUNY-Cortland, sought and was denied permission to host and participate in a group sales presentation by AFS in his dormitory room.

13. All documents produced by defendants at the request of plaintiffs and plaintiffs at the request of defendants are true and correct copies of the documents which were requested.

14. Jeffrey S. Zellan is an actual resident of a dormitory at SUNY-Albany where the challenged policies are in force.

15. The policy in effect at SUNY as of May 23, 1979 is annexed as Exhibit "B".

RONALD H. SINZHEIMER
Attorney for Plaintiffs
23 Elk Street
Albany, New York 12207

RONALD H. SINZHEIMER

DATED:

OF COUNSEL
DUANE, MORRIS & HECKSCHER
Henry T. Reath
1500 One Franklin Plaza
Philadelphia, PA 19102

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

BY _____
LAWRENCE L. DOOLITTLE,
Assistant Attorney General
of counsel
Telephone: 518 474-2234

DATED:

EXHIBIT "A"

COMMERCIAL PRESENTATIONS BY REPRESENTATIVES

OF AMERICAN FUTURE SYSTEMS, INC.

The following regulations are established in accordance with the June 3 1983 Preliminary Injunction Order entered by the Honorable Neal P. McCurn, U. S. District Judge for the Northern District of New York pending final determination in the *American Future Systems, Inc., et al. v. State University of New York College at Cortland, et al.* case.

Where a student residing in College housing elects to invite an American Future Systems, Inc. representative into his/her room to conduct, host or participate in a commercial presentation, such presentations will be allowed only in accordance with the regulations outlined below. No commercial activity involving the consummation of sales will be allowed on College premises CONSUMMATION OF SALES SHALL INCLUDE ACTIVITY SUCH AS THE TRANSFER OF CASH, CHECKS OR MONEY ORDERS IN EXCHANGE FOR PRODUCTS; THE USE OF CREDIT CARDS FOR THE PURCHASE, LEASE OR RENTAL OF PRODUCTS, AND/OR ENTERING INTO AGREEMENT (EITHER WRITTEN OR ORAL) FOR THE PURCHASE, LEASE OR RENTAL OF PRODUCTS.

If violations occur in relation to this sales prohibition and/or compliance with these regulations, the resident who issued the invitation and all other residents involved may be subject to appropriate disciplinary action American Future System, Inc.'s representative (s) may be subject to ejectment and may also be excluded from further entry onto College premises.

TIME

Commercial presentations given by invited American Future Systems, Inc. representatives will be limited to certain hours. During the year when residence halls are open to students, such presentations are permitted between 2:00 and 9:00 P.M. except during exam periods, when they conflict with study hours established by individual residence hall governance committees.

PLACE

No commercial presentations by American Future Systems, Inc. representative(s) are allowed in common areas of the residence halls. Only presentations in student rooms - with written permission from all roommates/suitemates and in accordance with stated rules and regulations governing such presentations - will be permitted. The number of participants will be limited to ten (10).

MANNER

Commercial presentations by American Future Systems, Inc. representative(s) will be allowed if they are by resident invitation and if a registration form is satisfactorily completed. All information and signatures requested on the registration form must be provided and submitted to the Director of Residence Life or designee by 12:00 P.M. (Noon) of the working day *prior* to the presentation.

The resident who has invited the American Future Systems, Inc.'s reprsentative into the residence hall to give a presentation is responsible for the conduct of his/her guest and must be present during the duration of the visit.

Date_____

REGISTRATION FORM FOR
COMMERCIAL PRESENTATIONS
BY AMERICAN FUTURE SYSTEMS, INC.

_____
Student's Name Room Number Telephone Number

American Future Systems, Inc.
Address and Telephone No.

_____
_____
_____
_____
_____

American Future Systems, Inc.
Representative's Name,
Address and Telephone No.

_____
_____
_____
_____
_____

AN AFS, INC. COMMERCIAL PRESENTATION is requested to be scheduled as follows:

Date:_____ Time:_____ Place:_____

I,_____, representing the company commonly known as American Future Systems, Inc., have read and agree to abide by all of the rules and regulations governing commercial presentations in the residence halls.

_____ _____
(AFS, Inc. Representative Signature) (Date)

I, _____, a student at the State University (campus name) and residing at _____ (building and room number), do wish to invite the above named AFS, Inc. representative to give a commercial presentation in my room. I have read and will abide by all of the rules and regulations governing commercial presentations in the residence halls.

_____ _____
(Student Signature) (Date)

I (we),_____, _____, _____, _____, _____, _____, the only (all of the) roommate(s)/suitmate(s) of the student named above, have read the rules and regulations regarding the commercial presentations and hereby grant permission for the above-outlined presentation to take place.

_____ _____
(Student Signature) (Date)

_____ _____
(Student Signature) (Date)

_____ _____
(Student Signature) (Date)

_____ _____
(Student Signature) (Date)

_____ _____

(Student Signature) (Date)

(Student Signature) (Date)

NOTE: This registration form is to be completed and submitted to the Director of Residence Life or designee by 12:00 P.M. (Noon) of the working day *prior* to the presentation.

EXHIBIT "B"

I. Board of Trustees' Resolution 66-156 as amended by Resolution 73-56 adopted February 28, 1973, and further amended by Resolution 79-100 adopted May 23, 1979, reads as follows:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events. This Resolution shall not be deemed to apply to Auxiliary Services Corporation activities approved by the University."

II. See Administrative Policies Item 007.1 for guidelines relating to on-campus banking services.

University of Illinois Solicitation Policy.

Overnight Guest

You may rent a cot and linen through your area office (Monday through Friday, 10 a.m. to 4 p.m.—for an occasional overnight visitor from out-of-town. The prior consent of your roommate(s) is necessary for any overnight guest in your room. Guests may not sleep in lounges or on lounge furnishings, and there is a limit of three nights for an overnight guest.

Undergraduate: Please let your Resident Advisor know when you have an out-of-town guest overnight. Relatives may try to contact a visitor because of a family emergency. If your Resident Advisor is not in, slip a note under her/his door telling about your overnight guest.

Solicitation

Solicitation in the residence halls is subject to regulations. Persons wishing to solicit need to check at the area office regarding procedures and methods, including postings, flyers, lobby tables, etc.

Commercial Sales

Sales representatives of commercial activities are not allowed to go door-to-door. Call your resident Advisor or area office if you see one in your area. However, you may invite a sales representative to your room to see you as your personal guest, if your roommate agrees.

Sales representatives cannot make presentations in lounges or other hall areas. Facilities such as bulletin boards and tables may not be used to advertise presentations. This restriction includes sales representatives or demonstrations involving magazines, beauty products, insurance, home products, wholesale orders, and the like. University property cannot be used for commercial enterprises.

Direct Examination of Kathleen A. Rapp.

(15) Q. Miss Rapp, would you state your name and address to the Court, please?

A. Kathleen Anne Rapp.

Q. And the acoustics—

THE COURT: Mr. Reath, you probably don't realize it but in our Court you have to stand unless you are excused.

MR. REATH: Excuse me, sir. I'm sorry.

THE COURT: If there is some physical reason you want to sit I would be glad—

MR. REATH: No, I am much more comfortable standing. Thank you, sir.

THE COURT: Thank you.

BY MR. REATH:

Q. Miss Rapp, the acoustics in this room are horrible and coupled with the fact that I have a little bit of a hearing problem. So would you try to project your voice as loud as you can so that his Honor and every body in the Courtroom can hear you.

A. Okay. I live at 7529 Glen Crest Avenue, and that's Liverpool, New York.

Q. Are you presently employed?

(16) A. No, I'm not.

Q. When did you sever your employment relationship with your prior employer?

A. The last day I worked was the last day of April, 1985.

Q. And that was with American Future Systems?

A. That's right.

Q. And what is your present occupation?

A. I'm a mother right now.

Q. You live with your husband and a family, is that correct?

A. Yes, I do. I have a four year old son and a year old daughter.

Q. Would you tell his Honor very briefly about your high school and college education and then your work experience thereafter?

A. I graduated from high school in Paramus, New Jersey. I attended the State University College at Oneonta.

Q. Where? Oneonta. And I have a degree in home economics education. Right after college I directly went to work for American Future Systems.

Q. And, again very briefly, tell us about the different positions and jobs you had with AFS and whether you received promotions and where you ended up?

A. Right. I started out my career with American Future(17) Systems in New England as a sales rep.

Q. Again, a little louder.

A. After two years I was promoted to the position of district manager in San Francisco which is a new territory for the company. After two years I was again promoted to a more senior level management position. Concurrently I got married, moved back to the east coast where I was managing sales reps as well as managers around—primarily on the east coast.

Q. Now, what was your position at AFS in October of 1982 at the time of what I will refer to as the arrest incident?

A. My position at that point was what you called a core district manager.

THE COURT: Core?

THE WITNESS: Core. C-O-R-E.

Q. And would you tell his Honor very briefly the back ground circumstances that occurred with your contacts with the SUNY campus involved immediately preceding the date of October 19. In other words, I want you to tell his Honor what happened that led up to that and then we will move into the actual day and cover that very quickly.

MR. DOOLITTLE: Your Honor. Objection. I don't understand the relevancy of this particular (18) testimony. The claim involving what happened on October 19 of '82 was dismissed on summary judgment.

THE COURT: Yes, that's true.

MR. DOOLITTLE: And I don't understand how this relates to the question of whether our policy—

THE COURT: Wait a minute, Mr. Doolittle. What is your proof going to be in this regard?

MR. REATH: Your Honor, very briefly, it will show, (1) the extraordinary harshness with which the university treated this particular client and this particular incident and the impact that it made on the students. And I think it goes as part of the totality of this case for the Court's understanding of what happened. It will be very brief and we will move right on.

THE COURT: I don't think there is any dispute as to the facts as what happened at that time, as I recall.

MR. REATH: I don't think there is any basic dispute, your Honor, but I think the explanation as to why Mrs. Rapp was there on the 19th and what had happened previously to one of her other assistants in the application of the policy has some relevance for (19) trier of fact as to the way in which, as I say, the harshness with which the university went about to apply and enforce its policy in an unnecessary and needless way.

MR. DOOLITTLE: I continue to object. I don't think this is relevant to whether our policy has an inpact on commercial free speech.

THE COURT: I will receive it. Again, there is no jury present, and it will be for me to determine whether or not it has any ultimate relevance to the issues before me.

MR. REATH: We will cover it very briefly and move forward.

BY MR. REATH:

Q. So what were the circumstances that led up to your appearance on the campus on the 19th?

A. One of my representatives, Kathy Delaney called me about a week before that and she was very upset because she had been putting on a presentation the night before and one of the dorm directors had come in and told her that—

MR. DOOLITTLE: Objection, hearsay, your Honor.

THE COURT: Yes. You can't say what somebody else told you. Sustained. You had a conversation (20) with one of your co-employees, is that right?

THE WITNESS: Right, my representatives.

THE COURT: As a result of that what did you do yourself?

THE WITNESS: She had been escorted off campus and told her she was not allowed back on campus—

MR. DOOLITTLE: Objection, hearsay.

THE COURT: Sustained.

THE WITNESS: In any event—

BY MR. REATH:

Q. As a result of talking with her what did you learn?

MR. DOOLITTLE: Objection, hearsay.
THE COURT: Overruled.

A. They threatened, if we came on campus, that we would be arrested.

Q. Okay. And then what transpired after that?

A. Directly after that?

Q. Yes.

A. She told me that her hostess had been—

MR. DOOLITTLE: Objection.
THE COURT: Sustained.

Q. Don't tell us what she told you. And if an objection is made to that we will just continue on. So, in they event, there came a time, did there not, when you (21) came on to a SUNY campus on October 19, 1982? A. That's right. There had been a show that had been booked. I called to verify to make sure the girl still wanted the show and wanted me to come. And she said she did, and she invited a group of her friends who were expecting me.

Q. Okay. So where was the show to be held?

A. It was on campus.
Q. What campus?
A. At the State University, Cortland.
Q. Then you arrived and just very briefly in your own words tell his Honor what happened? I assume you set up your material?

MR. DOOLITTLE: Mr. Reath is testifying.
MR. REATH: Well, I'm trying to—

BY MR. REATH:

Q. Go ahead.
A. I was escorted up to the room, set up all my materials put on my presentation. It was at the end of the presentation and there was about half the girls who were left still talking, deciding whether or not in fact they wanted to make purchases, when the dorm director came and told me that I had to leave and if I didn't leave right away I would be arrested. And I told her that I felt that didn't seem constitutional. (22) I was there as a guest of the student and if the student wanted me to leave I would be glad to. But the student had the right to do what she wanted in the privacy of her room as long as I wasn't doing anything that was disruptive or illegal. And she called campus security and he came and basically we had the same conversation and—
Q. Then did you ask the students whether they wanted you to leave?
A. Yes. I said if you would like me to leave I will be glad to.

MR. DOOLITTLE: Your Honor, I would like to renew my objection. This is all irrelevant to the question of the validity of our policy.
THE COURT: I am going to receive it. Overruled. I will rule on its relevance at the close of the case.

A. I said would you like me to leave? I would go gladly. But otherwise I feel what you are going is both wrong and illegal. He said, "you are under arrest, hands against the wall."
Q. And then what happened? What did he do?

A. The girls were agast. And my hands against the wall, and then he handcuffed me. And by this time a crowd of students was gathering, and he marched me out of the (23) dorm, leaving all my things behind, then went down to the Public Safety Building and, still handcuffed, they put me in a chair in the middle of a room. And he said to the one, another policeman, "watch her". Came back a minute later and said that's all right, unhandcuffed me and took my personal information and had me fingerprinted.

* * *

(38) MR. REATH: If you Honor please, in foundation, in anticipation of the testimony of Dr. Wachman I would like to let the record reflect, one, that counsel have furnished the clerk of the court with a stipulation of counsel which we will agree to and which I respectfully offer as part of the record.
(39) THE COURT: All right. That is the stipulation which was filed this morning?
MR. REATH: Yes, sir. And with the Court's indulgence, I don't intend to read it into the record unless you think it necessary, all of the paragraphs.
THE COURT: No, it is not necessary.
MR. REATH: Because I think they are
all perfunctory.
THE COURT: I will receive it, it becomes part of the record.
MR. REATH: With the Court's permission, and only just to serve as a prelude for Dr. Wachman's testimony, may I read now for the record from, paragraphs 7, 8, 9 and 10, and that is all that I wish to read.
THE COURT:You may.
MR. REATH: Thank you. Paragraph 7, "resolution 66-156 of the Board of Trustees, State University of New York, as amended by resolution 73-26 and resolution 79-100 provide, *inter alia*, as follows: No authorization will be given to private commercial enterprises to operate on State University Campuses or in facilities furnished by the University other than to provide for food, legal bever-

ages, campus book store, (40) vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." I can skip paragraph 8.

Paragraph 9, "pursuant to resolution 66-156 of the Board of Trustees as amended by resolution 73-26 and resolution, 79-100 and as applied and enforced throughout the SUNY system students on SUNY campuses are prohibited from inviting into their dormitory rooms commercial enterprises which furnish information, provide a produce or a service where the end result is the intent to make a profit by the invitee."

Paragraph 10; "pursuant to resolution 66-156, as amended—" and I am not reading the amending language, "defendant James Clark, SUNY Cortland, Clifford Clark, SUNY Binghamton and Vincent O'Leary, SUNY Albany deny American Future Systems, Inc. (AFS) access to present sales demonstrations at the invitation of student hosts in their dormitory rooms."

* * *

Direct Examination of Marvin Wachman.

(65) Q. Now, getting on then, Mr. Wachman, to your assignment in this case to give testimony before Judge McCurn, would you explain to his Honor very briefly what you did to familiarize yourself with the issues about which you are going to testify?

A. I read the material on the Penn State case and I read the material in the case of this Court. And I read the depositions, including the one that was referred to before, the Hosteter deposition, and several other depositions for AFS. And I read, of course, a great deal of material from the company, also saw their exhibits. I had seen this video presentation twice before and heard recordings of how the appointments were made with students and others connected with making a presentation.

Q. Okay. And were you able from reading the testimony of Mr. Hosteter that has been received in this court were you able to understand the SUNY position as to the regulation, its application and how it was enforced?

(66) MR. DOOLITTLE: Objection, your Honor. My recollection is that he was offered as a witness who was going to testify with respect to his expertise in certain areas. And from this questioning it is obvious the purported import of this is that the witness is going to direct his attention or seek to direct his attention with respect to what goes on in the State University of New York. And I submit, your Honor, that he wasn't qualified as a witness for that purpose. And it goes beyond what was originally established. That is hardly a generalized expertise that such as we have discussed in Mr. Reath's offer or proof.

THE COURT: Objection overruled.

BY MR. REATH:

Q. Would you answer the question outstanding? Do you want it read back?

A. I think I know what the question is. It is whether I was familiar with the position of the State University of New York and the regulation which you quoted at the beginning of the afternoon session. I certainly am. As a matter of fact, I saw it in other places in the Hosteter deposition, too, and to comment on general questions I would almost have to know what the regulation was. I couldn't answer any questions.

(67) Q. Now, I will represent to you and ask you to assume as part of a hypothetical question that there were five reasons that were articulated by Mr. Hosteter and by the other documents filed by the University. And they are, first, that one of the purposes and the stated primary purpose of the regulation was to create an educational atmosphere, and there I direct your attention and the Court's and opposings' attention to the Hosteter depositions at pages 19, 65-66 and 76. Second, administrative convenience. And there I direct your attention to the Hosteter depositions at 66 and 84. Third, a very brief reference to personal safety appearing in Hosteter deposition at 84. Five, protect students from exploitation by unethical entrepreneurs. And what is the reference to that? I don't have it in my notes. Here it is. That would be 96, your Honor. And I might say to the Court that these references that I am reading into the record are also contained in the digest that I have furnished the Court for its convenience.

MR. DOOLITTLE: I only have four, not five.
MR. REATH: I'm giving the fifth.
MR. DOOLITTLE: I'm sorry.

BY MR. REATH:

(68) Q. The fifth is potentially disruptive elements, and I think I have to add a sixth, which I neglected. There are six, not five. And the sixth was the argument of the intrusive effect on the university's mission and what I refer to in colloquial terms as the flood gate argument. Do you understand what I mean by the term the "flood gate argument"?

A. Yes.

Q. Now, directing your attention at those six articulated reasons as justifying a governmental interest which is furthered by the total ban on student activity as has been stipulated to, I am going to ask you as to each one of those articulated reasons to state your opinion, (a), your opinion as an expert as to the reasonableness and, (b), your opinion as to the effectiveness of the ban as a means of furthering or advancing each of the foregoing articulated reasons.

MR. DOOLITTLE: I object to the question, your Honor. I believe that that question calls for the ultimate conclusion that this Court is supposed to determine. I don't think that that is a proper question to be put to this particular witness. It is, particularly in the framework of the—in the framework under which his expert testimony was (69) offered. He is being asked to give you an opinion as to whether or not he thinks this court should find, this. This is the Court's job once the Court has heard the evidence.

THE COURT: On that basis, Mr. Doolittle, your objection is not sustainable. In federal court a witness may give an opinion, specifically provided for in the rules, on the ultimate issue to face the court. So that is no objection in federal court. Maybe in state. However, I have some—you better qualify him a little more to give this opinion. Or, let me ask him. You said that in Pennsylvania the state system includes Temple, Penn State and Pittsburgh.

THE WITNESS: And Lincoln. The three are called Commonwealth Universities. Now, they go through the same procedures for appropriations and for overall state regulation and—

THE COURT: Now, that's a particular situation they have in the Commonwealth. In New York State, as I am sure you know, we have the State University of New York. Are you generally familiar with the setup of the State University of New York?

THE WITNESS: I am. I lived here for fifteen years. I visited Cortland, Albany and—

(70) THE COURT: Did you have contact with the academic side of the State University during your tenure at Colgate?

THE WITNESS: I certainly did.

THE COURT: Are you familiar with the educational arrangement of New York State insofar as the State University of New York is concerned?

THE WITNESS: Yes. In fact, I was president of the Upstate AAUP and also of the American Studies Association of New York. We went to all the campuses and professors shared views on what was going on in the state system as compared to the private sector, and so on. So I have some familiarity. I have not been here for some years, however, except on visits, of course.

THE COURT: With your particular background and with the knowledge that you have would the answer to the question which has been interposed to you by your counsel, by the counsel for the plaintiffs, differ in its application to a system such as the state university of New York as distinguished from the system in the Commonwealth of Pennsylvania?

THE WITNESS: My impression is, and I believe it is based on facts known, that the (71) Pennsylvania system includes considerably were autonomy than does the state system in New York, despite the fact that in the Hosteter deposition there is reference to the autonomy for some of these matters in the various colleges within the system. That would be the difference. The system is even more recent than the state university system of New York, the Pennsylvania system. It goes back to 1965, '6.

THE COURT: I am going to allow him to pursue this line of questioning. And you can cross examine him on it and attempt to affect the weight to be given his answers by his experience, etc. Go ahead, Mr. Reath.

MR. REATH: Thank you.

BY MR. REATH:

Q. Now, let's take up the first one then. My question, sir, with respect to the articulated reason of creating an educational atmosphere as to preserve the importance of the educational mission of the university, what is your opinion as to the reasonableness and effectiveness of the total ban as a means of furthering that articulated explanation?

MR. DOOLITTLE: Your Honor, I have to continue my objection. There has been no foundation (72) laid any where for this opinion.

THE COURT: Overruled. You may attack the weight to be given the testimony on cross examination.

A. Well, all college professors, college administrators obviously want a positive educational atmosphere in the institution, including the residence halls. No question about that. I am a little bit amazed at the blanket, all inclusive regulation here that was read to us to keep all "commercial activities" off the campus. I think it is impossible to enforce. I think it is much too vague a principal. It isn't really defined. Anybody who has lived in dormitories, worked with dormitory residence advisors or directors, been in dormitories, knows that there are all kinds of activities that are going on. There are people coming in who sell college jewelry, there are all kinds of things that—of a "commercial" nature that occur in these dormitories. They are not isolated. I hesitate to say this, but it is true that in many resident halls, dormitory halls, and it was true in my day and it is still true, the students go to the library or some other place to study until very late at night because there's so many other activities going on. So I agree that there should be a very (73) positive educational atmosphere. I think there is no place for disruption of activities,

excessive noise, and so on. But I think that is a very, very broad, all inclusive kind of a ban to preserve an educational atmosphere.

Q. And what is your view, sir, as to the role of dormitory life as part of the overall experience of the educational life and mission of a college.

A. Well, that's the point. Dormitories, including the ones at Temple, at Lincoln, we were almost completely dormitory, Colgate completely, dormitory, fraternities, you have a lot of activities that use to be called extracurricular, now called cocurricular or something like that. And they might even include some kind of commercial activity given the very broad definition. Certainly they would include a variety of speakers, a variety of representatives of political parties, particularly if elections are going on. You want the students to be aware of and to be confronted with all kinds of positions, all kinds of activities that they will meet when they get out of school. You can't isolate them from everything and you've got to trust the students to make some judgments. They will make some mistakes, but they will make some judgments so (74) that they will be better able to make those judgments once they get out of school.

Q. And what is your view as to the part that this business of making choices and making decisions, whether it is about commercial product or otherwise, in the dormitory setting has as a part of the educational experience of the student?

MR. DOOLITTLE: I object.

A. The educators talk about developmental activities—

THE COURT: Just a moment. Hold it. You have an objection?

MR. DOOLITTLE: I didn't get the first part of the question, so I am not sure.

THE COURT: All right. Read the question back, Mr. Mayo, please.

(THE COURT REPORTER READ BACK THE LAST QUESTION.)

MR. DOOLITTLE: I would object to the reference in there "in the dormitory setting", your Honor.
THE COURT: Overruled. You may answer.

A. I am not a professional sociologist, although I was associated with many. Educators and sociologists talk about the developmental aspects of education. And this is part of the developmental aspect of human being, young human beings who will graduate at age (75) 22 or so. And you want to give them an opportunity to confront issues, problems that they will confront in what we call the world of work outside the world of word, which is the world of the university. So I would be, and I think most of my colleagues would be, very generous with students in tempting them to invite whom soever they wished into their dormitory rooms for various kinds of activities, including what are called commercial activities of the type here, as long as they don't interfere with the whole dormitory and as long as the other students didn't object.

Q. All right, sir. Now, the next one dealt with administrative convenience. Would you comment on that? And, again, answer the same question that I posed to you with respect to the first matter.

A. Well, it is hard to discuss administrative convenience. All of us would like to have a situation where we didn't have to be concerned with the regulations of anything. As a matter of fact, among administrators there is a joke that the greatest university is the university without faculty and particularly without students, then you wouldn't have to have an administrative regulations. But that is a very weak kind of an argument that you keep something out for (76) administrative convenience. That would be a general argument you would keep anything out. Why have any speakers, any controversial speaker? There might be some objection, there might be some shouting even in the public rooms. That is an argument that I personally, and I know many of my colleagues, would not support.

Q. Next, personal safety.

A. Well, I read the deposition. And Mr. Hosteter never comes back to that. I don't know that he is talking about. But on personal safety, of course, over the years, and I have lived with this having been a professor and administrator for so many years, we never use to have check in in the dormitories, in the residence halls. Now most institutions do. We shifted at Temple in my time there. We didn't have any check ins at the door. Now, of course, you have to have a card or you have to have some way of getting into the dormitory. And anybody who comes who is not a resident has to be brought in. And that's for safety, frankly. It certainly is at my university, Temple, because it is right in the middle of a pretty rough area. So I think that the—Mr. Hosteter raises the question and just states it, but never comes back to it. And I can only think that he means, (77) something about criminal or narcotics—

MR. DOOLITTLE: Objection.
THE COURT: Sustained.

BY MR. REATH:

Q. Now, moving on, the next is to protect students from exploitation by unethical entrepreneurs. What is your—

A. Well, that may be, again I speak as an administrator, that may be a valid thing to do if somebody proves unethical exploitation. But I haven't seen anything in the record on that at all. As a matter of fact, that's what—I hesitate to even say this, that's what the ethics audit was all about. But I can understand on an occasion how that would be an appropriate reason for keeping somebody out, some business person, some peddler, some vendor, was promising something that wasn't delivered, that could be some kind of regulation that I wouldn't object to.

Q. And in your opinion is a total ban of all activity required or reasonable to meet that problem?

A. I should say not. I certainly would wait until there were objections, and more than one, before I would get into that kind of thing.

Q. Then the last one—before I go to the last one, (78) I have one preliminary question. You are familiar with the term, are you not, in loco parentis?

A. I am.

Q. And what is your view as to the viability of that doctrine or principal with respect to the role and function of a university in controlling how students use their leisure time?

A. This may be a strong statement, but as a longtime academician, college administrator, I would say in loco parentis is dead. And this may be presumptious, but I think probable this court case is an indication of what is going on. The Courts never got involved in student activities or anything else unless there was some criminal activity or some civil case. But beginning about 22, '3 years ago the whole situation changed and it isn't the universities that are in loco parentis. I think there may be some other groups outside. But in loco prentis as we use to know it where you limited visitors where you had lights out, that kind of thing, it really doesn't exist any more and everybody knows that. It went away in the '60's too far away, I would say. But it just as a principal for students has been lost along the way. It doesn't mean there can be no regulations. I don't mean to say that at all.

(79) Q. Understood. Now, lastly would you focus, sir, on what has been referred to as the intrusiveness or flood gate argument?

A. Well, as I understand that argument, that is if you have one commercial enterprise, business enterprise, come in to a residence hall that will open the flood gates for all of them. I think the students are very well capable of handling that themselves, particularly if it is not a door to door solicitation kind of thing but rather must be done by invitation by the student with a recognized student seeing the person in from the main door, testifying to the responsibility of the student, and so forth. I don't see any argument for flood gating, at all.

Q. Would you comment, sir, and further elaborate just in a word or two regarding your view of the maturity of students and their ability to make these kind of intelligent decisions and what experience you have had that would bear out your answer?

A. Well, part of a life of a college president, your Honor, is to speak with parents and with distant alumni and others who feel that students ought to be regulated more. That is particularly true in the case of the stance of professors outside of the classroom and the fear that their views will go into (80) the classroom. It is

particularly true about students inviting controversial speakers on the campus, in a residence hall or whatever. And I must say my experience over the years, this is going back over 40 years, is that the students make very good judgments on these matters. And they are not going to let themselves be abused or exploited and other students are not going to let them do things that will impact upon them in a negative way. Now, they may make mistakes, that's very true. But by and large I have a great deal of faith in student decisionmaking. I have been very uncomfortable with some of the decisions that some students have made in disrupting speakers, whatever position they take, right or left. I don't like that at all. I don't think that should be the case and students have to be chastised on that. But by and large I would respect the judgment of the students on who they want in their residence halls, who they want to have speakers and what activities they want to support.

Q. Now, finally, sir, you are familiar with an AFS demonstration and what AFS is doing in their techniques of working with students at demonstrations in student rooms?

A. Yes, I am.

(81) Q. And based upon what you know and what you have seen and heard here in Court today how would you characterize that kind of an activity in the total spectrum of other activities that traditionally take place in a residence hall and in dorm rooms of students at state university?

MR. DOOLITTLE: Objection. I don't understand the question, your Honor.

THE COURT: Well, overruled. You may get the understanding when you hear the answer.

MR. DOOLITTLE: And I also think there is a question of relevancy, because once again we are back to, I think, the plaintiffs' attempt to justify the truth, falsity—

THE COURT: No, I don't think so. He's asking him based upon his experience, his education, his background, etc., as an educator, all things he went through here, and based upon his knowledge of the AFS proceedings and functions and demonstrations does he have an opinion where that fits in in the educational process of a student

along the lines of what we have been discussing here. Just giving a general answer.

MR. REATH: And if the full spectrum of the range of activities and things that go on within (82) a dorm.

THE COURT: I am going to allow him to answer.

A. I am not going to say that the greatest educational activity that goes on in the residence hall, or any place else, is the kind of activity we saw on this video cassette. Not at all. However, I would argue that there is an educational content to it, very definitely, compared to most of the things that go on, or many of the things that go on in residence halls. I would say it is a very mild activity, it is a non-disruptive activity. I am sure if the giggling that was going on in that video led by the person representing AFS was too loud that there would have been—it wouldn't be permitted by the others in that residence hall. So given the spectrum, as you put it, Mr. Reath, I think this is a positive kind of activity for a residence hall.

* * *

Cross Examination of Marvin Wachman.

(93) Q. "Rules prohibiting commercial solicitation in residence halls are quite common in American higher education." Are they common?

THE COURT: Is it true, Doctor, that rules prohibiting commercial—

Q. Commercial solicitation in residence halls—

THE COURT: Are quite common in American—

MR. REATH: I am going to object unless it is more qualified. I think we have to know is that referring to a distinction between solicited or unsolicited, what is the definition of commercial.

THE COURT: No, overruled. You can redirect on it. Can you answer that question, Doctor?

A. I would say that there are many institutions that have such regulations and there are many that do not have (94) such regulations. And I don't know of any except this case that prohibit invited guests selling things on the campus. That's been true through my whole career. Because that kind of activity exists whether or not there is a general regulation about commercial activity. Just does. All you have to do is go into the dormitories, live in them or be in them on anything like a regular basis.

* * *

(97) Q. And how does that work?

A. We have a guard at the door. And you have to have an ID card and if you are invited then somebody who lives in the dorm has to come down and show you in. You have to identify yourself.

Q. Do you have any other regulation that relates to access?

A. That's the prime—that is the only access that I know.

Q. Do you allow door to door solicitation in your dormitories?

A. No, it wouldn't be allowed because the student would have to bring whoever was coming in to his own room.

Q. Do you allow students to operate their own commercial enterprises in their rooms or out of their rooms?

A. I don't know if we allow it, but I'm sure some do. There are students known to be in the food service, bring food in, that kind of thing. That is so common in educational institutions that it is almost not worth asking. It just happens.

Q. But do you have a rule against it?

A. No, we don't have a rule against it.

Q. You don't have a rule against a student using his room for commercial purposes of his own, like running, (98) a business?

A. I'm not sure about that. There may be a rule. I have seen all of the rules, I never seen that one.

Q. I would like to ask you a hypothetical of my own, if I could. Before I do that I want to ask one other question. Do you permit outside commercial enterprises to come on the campus and engage in commercial activity in the public area, the open areas of your campus as contrasted—

A. We are right in the middle of the city. We have vendors all over the place. In fact, we count on the vendors to help service the institution, as far as food is concerned. Public streets run right through the university, not at our Annenburg Campus, which is a suburban campus, which is largely residential. And. we don't have vendors out there. But what we call the main campus, that would be the case.

Q. That is a downtown location, then?

A. It's a downtown location.

* * *

Direct Examination of Stephanie V. Vaiano.

(103) Q. Miss Vaiano, could you state for the stenographer, please, your full name?

A. Stephanie Ann Vaiano.

Q. And would you try and keep in mind the poor acoustics in this room, keep your voice up and speak slowing because the court stenographer must taken down everything you say. Stephanie where do you live?

A. I live at 5452 SUNY, Binghamton, in Binghamton, New York.

Q. That is your legal residence?

A. Yes, it is.

Q. And where is your family, home?

A. They are located in Huntington, Long Island.

Q. Okay. And when did you first enroll in the State University system at a college or university within the system?

A. That was in August of 1984. I enrolled at Cortland College.

Q. I see. Now, tell his Honor just very briefly in a word or two about your schooling, high school, your (104) college and any special academic achievements or positions of leadership in student government, either in high school or in college?

A. Okay. I graduated from—

Q. Stephanie, really, you will have to shout.

A. I graduated from high school in Huntington and I graduated with honors. I was a member of the National Honor society. I was involved in yearbook and FBLA, Future Business Leaders of America. At Cortland College I was a senator of my dorm and

I was also secretary of the student government. I was involved in SAB, a chairperson for concerts. And I have always been involved in student leadership activities.

Q. And there came a time when you enrolled at Cortland, is that right?

A. Yes.

Q. And did you live in a campus, in a dorm there?

A. Yes, I lived in a dormitory for two years.

Q. As a matter of fact, unless you had a family home within the immediate area it was conclusory, was it not, to live in student dorms?

A. Yes, it was for the first year and then for the second year they encouraged you to live on campus.

Q. I see. And what positions of leadership, if any, do you now have in student government at Binghamton?

(105) A. Right now I'm a student association representative for the Colonial, which is a residential area for SUNY Binghamton. And that also involves a lot of student rights opportunities for students getting involved in activities.

Q. And tell his Honor just a word or two about the facility where you have your residence hall at Binghamton.

A. Okay. It's SUNY residential area, and it's apartment type setting. It's off campus. It's about 15 minutes from campus. We have a facility for studying and we are considered living on campus. We get the benefits of on-campus or on the full meal plan.

Q. Are you subject to all of the same rules and regulations that apply to students that live in other residence halls on campus?

A. Yes, we are.

Q. Now, how did you become interested in this case? What was your first contact with the case and how did you learn about it and what did you do?

A. Through student government at SUNY Cortland, the vice president called me to come down, said—

Q. Who was that?

A. That's Ed Detweiler. And he told me that Mr. Satell was there and would I like to be involved in (106) the student rights case. And I was very interested. I went down. He explained the issue to me and I felt that the rule was an infringement on my rights. And I decided to become more involved in it and help out in any way that I could.

Q. Okay. Now, you understand—you were in Court this morning and you, of course, heard Dr. Wachman testify, right?

A. Yes.

Q. And you have previously reviewed with me the testimony of Mr. Hosteter, right?

A. Yes, I have.

Q. So you are familiar with his testimony regarding the regulation and how that regulation is applied and enforced throughout the state system?

A. Yes, I am.

Q. And do you understand that under the application of that policy as to all students within the system and at colleges within the system, that you are not permitted to invite or participate in a gathering of friends in a dorm room to discuss any subject with a third party invitee if that third party invitee is being paid money for the purpose of being there?

A. Yes, I am.

MR. DOOLITTLE: Objection, your Honor.

(107) THE COURT: Sustained.

MR. DOOLITTLE: I don't think there's any basis for that.

THE COURT: Sustained. Yes, leading.

MR. REATH: I had thought it was permissible, your Honor, to state a premise that summarizes—

THE COURT: Well, yes. But you are leading her right through it. She is a plaintiff in this case. Why don't you give her the regulation and have her give us her understanding of it.

Mr. REATH: Fine.

BY MR. REATH:

Q. I direct your attention to the regulation which is designated Resolution 66-156 as amended and which is applicable to the Binghamton campus. And that reads as follows: "no authorization will be given to private commercial enterprises to operate on state university campuses or in facilities furnished by the university other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." Okay?

A. Yes.

Q. Now, are you familiar with the way in which that (108) regulation has been applied and enforced insofar as your right to invite certain third persons to your dormitory room?

MR. DOOLITTLE: Objection, your Honor.

A. Yes, I am.

THE COURT: Overruled. Isn't there a stipulation on this?

MR. REATH: Yes, there is. That's right.

BY MR. REATH:

Q. And I direct your attention to paragraph 9 of the stipulation agreed to by the parties which says, "pursuant to the foregoing resolution," which I just read you, "students on SUNY campuses are prohibited from inviting into their dormitory rooms commercial enterprises which furnish information, provide a product or a service where the end result is the intent to make a profit by the invitee." Okay?

A. Yes.

Q. Now, will you state to the Court how you feel that that regulation as applied and enforced by the university infringes on what you understand to be your rights?

MR. DOOLITTLE: Objection, your Honor. I don't think there is any basis for that part of the the question which talks about the regulation as interpreted and applied by the university. There is (109) no foundation

anywhere in the record so far as to what that is, much less for what this witness' availability is.

THE COURT: As to the first part I think you stipulated to it.

MR. REATH: Paragraph 9.

THE COURT: Paragraph 9 you stipulate how it is applied.

MR. DOOLITTLE: We stipulated to a situation which it does apply. But I think his question is far broader and it is what the stipulation is. It is just that one little piece of it.

THE COURT: You're asking her how she feels about it. How is that relevant, how she feels about it?

MR. REATH: Not how she feels, has this—

THE WITNESS: Your Honor—

THE COURT: No, no. You can't ask any questions.

BY MR. REATH:

Q. Does this prohibit you from engaging in any kind of conduct that you feel you should be permitted to do?

A. Yes, it does. I have the right to make a decision as to who I have in my room and who I do not have in my (110) room, whether it be for a social gathering or commercial gathering.

Q. You feel—

A. And I feel that these rules are threatening my constitutional rights.

Q. All right. Now, are you familiar with the testimony of Mr. Hosteter regarding the hypothetical situation discussed with him about a group of students who might desire to invite, for example, a medical doctor, a group of women students to invite a medical doctor to advise them on women's health matters, including such subjects as fertility, abortion, birth control and the like?

A. Yes, I am.

Q. And would you state to his Honor whether you feel that that policy as applied infringes on any rights that you would chose to exercise?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Sustained.

MR. DOOLITTLE: Calls for a conclusion.

THE COURT: I don't know that that is the policy that's applied.

MR. REATH: Well, it is. It has been stated, your Honor, as an application of the rule.

THE COURT: Where is it stated?

(111) MR. HEATH: Stated in Hosteter's deposition.

THE COURT: You've got to point that out. I haven't read Hosteter's deposition.

MR. REATH: That's in the record, your Honor. And I will direct the Court's attention—It is referenced in several places. This is part of the problem of moving ahead without going through the Q&A. I represent to the Court to a certainty it is there.

THE COURT: But I would like to know where.

MR. REATH: I understand and I will find it, sir.

(THERE WAS A PAUSE IN THE PROCEEDINGS.)

MR. REATH: Your Honor, I apologize to the Court. Apparent it was in the deposition of Mr. Franco. And I will read now from the record for the witness—

MR. DOOLITTLE: Objection, your Honor. First will you tell me where you are going to read from?

MR. REATH: Yes, from the Franco deposition beginning at page 33. I begin the transcript, your Honor, as part of the hypothetical (112) laying the foundation from which I will then ask the question beginning in the middle of page 33 and continuing over through page 34.

MR. DOOLITTLE: Your Honor, this witness hasn't been qualified to answer a hypothetical question.

MR. REATH: Just wait and see. I want to establish the foundation of what she has been prohibited from doing.

THE COURT: I don't even know what the question is going to be yet. But he's reading from a deposition by Raymond Franco, a representative of the State of New York. Is that in evidence?

MR. REATH: No yet, your Honor. It will be offered in evidence and I can offer it in evidence at the appropriate time. But for now I would like to take this one section. I will represent to the Court that Mr. Franco, as was Hosteter, was tendered as the spokesman—

THE COURT: I will allow you to ask the question subject to later connection with the testimony. Let him ask the question and I will take any objection when you get through. Now, what is the question?

BY MR. REATH:

(113) Q. Now, Miss Vaiano, I represent to you that during depositions that were taken on November 18, 1985 at 10:00 a.m., or Raymond Franco, it was stated that he was the Assistant Vice President for Student Affairs and Director of Residence Life. At that deposition he was represented by counsel and in the course of the deposition he was being asked about the same regulation that we identified a moment ago and to determine how that regulation was applied and enforced at the Cortland campus. And I asked the following questions to which he gave the following answers. And then I will ask you a question related to that. Question of Mr. Franco, "if a student had a sister who did knitting at home and she had samples of her sweaters that she would make and order would a student be permitted to invite a group of his or her friends to the student's room, invite her sister to come and demonstrate her products and take orders to make sweaters for whoever wanted to buy them?" "Answer: No, stu dents would not be permitted to invite or to participate."

MR. DOOLITTLE: Objection.

THE COURT: Yes, sustained. I think that after "no," it was an interpretation by counsel.

(114) MR. REATH: I'm sorry. It is, indeed, and I apologize.

BY MR. REATH:

Q. "Question. And is that because of this policy that we have identified in P 4," which is the same policy I read to you a minute ago. "Answer. That is for the same reason that we talked about when we talked about insurance people and lawyers or anybody

else who wanted to come in to the student's room to sell either services or merchandise. I wouldn't view the sister as being any different than the independent knitting firm down the street." "Question. I see. And how about a doctor that was giving—not giving, for a fee, selling his services and advising on birth, control techniques and procedure? The same thing?" "Yes, I think so. I think there would be more appropriate places for that to take place, such as the women's health clinic on campus." "Question. If for, one reason or another a student didn't have confidence in the university facility and decided they wanted to have a doctor of their own choosing come and meet with them and describe the availability of his or her services that would be prohibited?" "Answer. Yes." Okay.

A. Yes.

(115) Q. Now, understanding that those are the statements made by the Cortland person in charge of residential affairs will you state whether that prevents you from engaging in an activity that you might wish to engage in?

A. Yes.

MR. DOOLITTLE: Objection.

A. Yes, it does.

THE COURT: Overruled.

A. Yes, it does.

Q. Why?

A. Because I'm old enough to make my own decisions about who I have in my room, and for the college to tell me no, I cannot have such and such a person in my room is an infringement on my right to privacy, my right to be left alone. I just—I feel very threatened by the rule. And so much of it goes on anyway.

Q. Well, we will come to that. Now, you say so much of it goes on. I will come back to that in just a moment. I want to now ask you a few questions about an AFS demonstration and then we will come back to that very subject, okay?

A. Okay.

Q. Are you familiar with what has been described in court as a typical AFS sales demonstration through the (116) medium of a student host or hostess having a party at his or her room and having a representative from AFS come and tell about the product and what they offer?

A. Yes, I am. I saw the tape twice.

MR. DOOLITTLE: Objection.

THE COURT: No, overruled. She says she is familiar with it.

Q. And based on your understanding of what a typical AFS sales demonstration in a student room consists of how does that compared with the range of other activities that you are aware of that go on within the dormitory rooms?

MR. DOOLITTLE: Objection.

A. It would be among the—

MR. DOOLITTLE: Objection. He hasn't laid a foundation for what other activities.

THE COURT: Sustained. And you also asked her, first of all, you asked her whether she was familiar with the type.

MR. HEATH: Yes, and I think she said she was.

THE COURT: She said she was, she saw the tapes. Then you said based on your understanding of what—I don't know whether you were talking about the same thing. Did she understand—

(117) BY MR. REATH:

Q. Based on what you saw in the tapes as a sample form of an AFS demonstration my question is would you give us a range, give us a description of a range of other kinds of activities that go on within the dormitory room.

A. Absolutely it is not a disruptive activity. One of those demonstrations would be conducted in my room with no friends and as long as it was kept, you know, down I can't see how it would disrupt any other students or any other activity in the dormitory. I mean it's not like we are blasting radios or having, a wild party or playing electric guitars or anything like that, which goes on constantly in the dorm.

MR. DOOLITTLE: I move to strike it. I don't think the answer was responsive to the question.

THE COURT: No, overruled. I will receive it.

BY MR. REATH:

Q. Would you tell us—you mentioned some—but would you mention as best you can reconstruct the full range of activities from sleeping, eating, studying or whatever, what are things that go on in the ordinary course in a student dormitory during the day and (118) night?

A. Well, it's our home and we use it as such. It is a little bit crazier than it would be at home, though. A lot of practical jokes go on, a lot of parties, a lot of socializing. Not such studying. We have separate facilities for that. And almost every dormitory and in every college at Binghamton they have their own library. At our residential area we have a coffee house which is where we study. But the dorm, the rooms themselves, are not really meant for—I mean it would be nice if you could study there, but it's really kind of impossible. There is always something going on. There's always some sort of craziness going on.

Q. Now, are you aware of other activities either commercial or otherwise that go on in the dormitories? And I want you to speak of your own personal knowledge and experience.

A. Well, we have parties, a lot of parties. And last week was my friend's birthday and a bunch of us chipped in and we sent a belly dancer to his room. And I mean I don't know if that would be allowed, but it happened. That's what goes on. We have parties where people sell chocolate and make-up and things like that. And no one has ever expressed their, you know, anger or— (119) as long as it is kept down and quiet I haven't heard of any thing being objected to by the RA.

Q. Now, are you permitted to have radios and televisions?

A. Yes, we are. We are encouraged to bring them up to campus.

Q. In the course of watching, listening to a radio show or watching the television shows are there solicitations from commercial activity offered by national advertisers?

A. Sure. I think every morning when you wake up with the radio you are subject to advertisements until the minute you go to sleep at night. But I think that students are intelligent enough to make a choice as to whether to run out and buy scope or whatever product they are advertising on TV. They are not knocking on our doors either.

Q. And are you aware of do students have VCR's and play commercially bought tapes?

A. Yes, they do. We have VCR's, Atari, Coleco Vision, computers, all sorts of video games and entertainment.

Q. And are any of those prohibited by the university?

A. No, they are not.

Q. And are you aware that students from time to time may use their VCR for viewing sexually explicit films (120) or pornographic films? A. Yes, I am. But what goes on in the privacy of each person's room—I mean I don't think that that should be the campus' you know, obligation to enforce what goes on as long as it is lawful.

Q. All right. Now, the university has taken the position that to the extent that a student wishes to have a third party invitee come to the room for any purpose where that invitee is being paid or is engaged in a commercial enterprise that that would have to take place off campus and that nothing would prevent you from going off campus to participate. You understand that that is their position?

A. I understand and it frightens me only because it's a fifteen minute walk from campus to my dormitory. And we have a lot of rapes going on at Binghamton, at all the campuses right now, and it frightens me to think I would have to walk up to campus and back from campus just to see a presentation when I can have it in the privacy of my own dorm room with my friends who most likely would be living in the same area as I was.

Q. Now, I show you an exhibit which has been marked for identification as Plaintiffs' Exhibit 21, which consists of a series of ads and other material that (121) I will ask you to describe in a moment. Directing your attention at Exhibit 21, will you look at that and tell his Honor does that contain a collection of materials that you personally collected from bulletin boards on the Binghamton campus located within residence halls?

A. Yes, they are. I went to a bunch of different dormitory halls and they were all advertisements on the bulletin boards for video rentals, refrigerator rentals, bus trips into the city, summer trips to London, magazine advertisements, film advertisements. That's really about it. I saw several other things posted in the dorms in the beginning of the year. We all sell books to each other. Signs were posted, but when I went to look they weren't up any more because it was already well into the semester.

Q. And do you know whether or not with respect to this kind of promotional advertising that appears on the bulletin board within the residence halls whether the university makes any effort to prevent that from being done?

A. Well, most of the bulletin boards are directly across from the RA's offices, so I can't see any objection on their part.

MR. REATH: All right. If your Honor (122) please, at this time I would offer, because the witness is here and the other side may have questions on cross examination, I offer plaintiffs' Exhibit 21 together with the summary on the cover page which identifies what the advertisement is and where it came from.

MR. DOOLITTLE: I haven't seen it yet.

THE COURT: Yes, you may.

MR. DOOLITTLE: And one point of clarification, these materials were all posted inside a dorm or dorms?

THE WITNESS: Inside different dormitories on campus.

(THERE WAS A PAUSE IN THE PROCEEDINGS.)

MR. DOOLITTLE: No objection.

THE COURT: All right, received.

(PLAINTIFFS' EXHIBIT 21 WAS RECEIVED.)

MR. REATH: And also I would like the witness to identify Plaintiffs' Exhibit 20. I have shown that to Miss Dias. That's the rules and expectations publication, State University of New York at Binghamton, 1986-87.

BY MR. REATH:

Q. I show you a document marked P 20 and ask you to corroborate what that is.

(123) A. Okay, this, is a rules and expectations. It just goes over all the basic rules of conduct as far as what has to go on on campus and what you can and cannot do.

Q. And just to complete the record on these two points I direct your attention to page 7 and direct your attention to paragraph 14 on page 7 respecting commercial activities. Would you read that? It states no commercial—

MR. DOOLITTLE: Objection.

THE COURT: Sustained. It is not in evidence yet.

MR. REATH: Oh, well, all right. Then I move in evidence, your Honor, P 20.

MR. DOOLITTLE: No objection.

THE COURT: Received.

(PLAINTIFFS' EXHIBIT 20 WAS RECEIVED)

BY MR. REATH:

Q. Now, I direct your attention to paragraph 14 which relates to commercial activities. Would you read that, please?

A. Yes. It says, "no commercial activity may be conducted in or from a residential hall."

Q. I think it says actually a residence hall.

A. Residence hall.

(124) Q. Okay. And then at page 6 there is reference, is there not, to the fact that all freshmen are required to live on campus unless permission to live off-campus is received from the residential life office, is that correct?

A. Yes, it is.

Q. And then there's certain exceptions that are referenced that we don't have to read.

Mum-Mum.

MR. REATH: No further questions, your Honor.

THE COURT: Cross examination?

Cross Examination of Stephanie v. Vaiano.

Cross Examination by Mr. Doolittle:

Q. I just have a couple of brief questions here. You are not a freshman?

A. No, I'm not.

Q. Is that correct?

A. Yes, it is.

Q. So that part you read concerning freshmen does not apply to you?

A. It did my first year. I was a freshmen in a dormitory at a SUNY school.

Q. But that was under the Cortland rules, you were at Cortland then, right?

A. Yes.

(125) Q. You mentioned your concerns about the rape or rapes that you referred to before. Do you feel that students are concerned about things like safety and security?

A. Absolutely. We have a lot of problems right now in my residential area where they have emergency phones all over the campus, blue light phones they were called, to direct to the emergency on campus, public safety. And in our residential area we have none. And right now there's a big petition going around, get up a committee trying—fighting for those phones so that we can have them also because we are afraid to walk to and from campus.

Q. Just a point of clarification, do you say that nobody, in your residential building, the one that you live in, studies in their room?

A. Not—nobody. I don't know for sure, but most people, I will say 90 percent that's an estimate, that's a rough estimate.

Q. What do you base that estimate on?

A. What do I base that estimate on?

Q. Yes.

A. My experience as a student at a SUNY school.

Q. You have been in Binghamton now long?

A. At Binghamton, I have been there—this is my first (126) semester, but I also went to Cortland for two years.

Q. I understand that. But you have been in Binghamton since when? What date did you arrive?

A. August 23rd, I believe.

Q. When did school start?

A. I'm not sure of the date. I'm not sure. I think it was two days later.

Q. And how do you know that people aren't studying in their room? Do you walk around and look?

A. Well, the people that live close to me I know do not study in their room. And I do walk around and look. We are very sociable, it's a very social atmosphere. And people try to study in their room but not too many people do.

Q. But the rest of them try, do you think?

A. There are some that try.

Q. Are there any rules that you are aware of in your residence hall about noise?

A. Well, we have some restrictions, quiet hours, but they aren't really heavily enforced. No one really wants to complain. Everyone is kind of nervous about being a bad guy. So that's why most people do resort to the other areas which are really convenient, so it's not too much of a problem.

Q. Do you have any friends who live off campus?

A. Yes.

MR. REATH: Excuse me. I didn't hear the question.

Q. Do you have any friends who live off campus?

A. Yes, I do.

Q. Do any of them live in their own apartment or living situation?

A. Yes, they do.

Q. Have any of them ever invited to attend their place of residence an AFS demonstration?

A. Not an AFS demonstration, but other demonstrations, yes. Not at Binghamton, at Cortland.

Q. You went off campus to what kind of demonstration?

A. Chocolate making party, lingerie parties.

Q. But you never have been asked to an AFS party off campus?

A. No.

Q. Have you ever attended one any where?

A. No, I haven't, but I would like to host one someday, hopefully.

Q. And nobody in the university has ever told you you can't go on one if it was off campus?

A. Well, it's written in the book, it's written in the rules and expectations booklet that we can't attend any commercial activities in the dorm, so I would—

(128) Q. But you are not aware of any university rule that says you couldn't go off campus somewhere to attend such a demonstration?

A. No. And I wouldn't mind going off campus if it was in walking distance and if it was a lit path with an emergency phone. But in my case it isn't.

Q. What about if it was in the afternoon when it wasn't dark?

A. If it was in the afternoon it would be a lot less convenient for me because usually there are classes and other activities during the day.

* * *

Direct Examination of Kathleen A. Rapp.

(141) THE WITNESS: Overall I think there were three reasons to have the shows. One is they are enticed by the Florida holiday.

MR. REATH: I'm sorry, you will have to keep your voice up.

THE WITNESS: I'm sorry. They are excited about the Florida holiday. Second, you get an overwhelming response that they have because of save the children. They feel it is a way they can help without spending money by just contributing their time And, third, because they think it will be interesting and informative and relevant to their lives.

* * *

Direct Examination of Steven Gawley.

(162) Q. Mr. Gawley, would you state your full name for the record, please?

A. My name is Steven Gawley.

Q. And where is your legal residence?

A. My legal residence is Livingston Tower, Colonial Quad, at the State University of New York at Albany.

Q. And where does your family reside?

A. My family resides—well, that's a mystery. They are all over the place from Long Island, New Jersey, different places.

Q. Okay. And you are currently a student enrolled at the Albany campus of the State University?

A. I'm a student at the State University.

Q. And tell his Honor when you first enrolled at a SUNY college or university?

A. I enrolled in September of 1982. That's my first semester at the State University. This is my final semester.

Q. And just very briefly I want you to focus on two aspects, at the moment, of your life at college at the university. First briefly tell us about your academic qualifications or achievements, special (163) honors.

A. I have taken my academics pretty seriously. I am inducted into the Phi Beta Kappa last semester and I am a member of the Signum Laudus Albany Honor Society, which is for the top four percent of the class. So I have been pretty actively involved in academics.

Q. And what has been your areas of concentration or major?

A. I'm a political science major with a minor in history.

Q. Now, tell us briefly about any leadership positions you had in student government or any other non-academic achievement or recognition that you have had?

A. Briefly, I have been a member of the—I was a member of the student government legislature for three years and then I was, in 1985-86 I was a student association president. And I have been in various campus groups. I was president of pre-law society and a number of other campus groups.

Q. Now, I show you a document marked for identification as Plaintiffs' Exhibit 24. Excuse me. Withdraw that, if you would, please. I am going to show you a document marked for identification as Plaintiffs' Exhibit 25, which is the Viewpoint 85-86. And just (164) for purposes of identification, we were looking at that last night, and I think you showed me the page where it talks about the student association, pictures, and your picture is in there, is it not?

A. Yeah, in page 44 and 45.

Q. Directing your attention to page 45, that's your picture, is it, in the upper lefthand corner?

A. Yeah, that's me.

MR. DOOLITTLE: I think I object. It's not evidence.

THE COURT: No, overruled.

A. Yeah. And the other officers.

BY MR. REATH:

Q. And what was your position at that time in the student association?

A. At that time in 1985-86 I was a student government president, student association president.

Q. I see. And would you tell his Honor briefly about thestudent association, what it is, how it functions, what relationship it has with the university. And make it very brief, but just enough—

A. Sure. Your Honor, the student association at SUNY Albany is an organization that funds over 70 campus groups. We fund the entire athletic program. We have a budget approximately of about $1 million. We (165) tax each student approximately $100

per year that they put into a general fund. It's a mandatory fee which we administer. Our relationship, we occupy certain number of offices on campus. We have a whole complex on campus that we operate. And our relationship with the university is we are called on by the university to work with them kind of official representatives within the government enhancing process in terms of faculty, all sorts of decisions to be made on campus. That's kind of our procedure to be followed in the university governance.

Q. In your capacity as president do you have occasion to meet with any regularity with senior people in the administration?

A. Certainly. We met with President O'Leary, probably monthly with the vice president for student affairs, Frank Pogue, Dr. Pogue. We met with, you know, I would meet and speak with him at least, if not meet with him, at least four or five times a week.

* * *

(192) You are aware of the limitation, are you not?

A. Yes.

Q. Now, would you tell his Honor how you came to be involved in this action and became a party and are now a witness testifying in these proceedings?

A. Your Honor, I first became involved, initially aware of the case through Rich Schaeffer, who was the student government president in—I guess it would be 1983, when I first became a plaintiff. I was familiar with the American Future Systems Demonstration. There had been one on the 20th—I lived on the 21st floor of one of the towers in one of the quads at the State University at Albany and there was a demonstration on the floor below me. And my girl friend had attended the demonstration and I had been in and out of the demonstration a couple of times. So I was familiar with the company and with the demonstrations before I heard about the case. The president of the student government, Richard Schaeffer, approached me and I was particularly interested and, you know, at what the case involved. I didn't, you know, on a very—in its most basic level I didn't think there was anything wrong with the demonstration that they had

held in the dorms. I didn't think there was any reason to ban it. I (193) wasn't—no one tried to stop the demonstration. I guess according to the regulations, I guess the residents, people in residence had been on their toes they would have stopped it, but they didn't. There wasn't any—

Q. You are referring to the one that you saw?

A. The one that I saw I guess they would have stopped it, but it's—the regulation obviously was in effect then, too.

Q. Well, did there come a time when you learned of the circumstances of the arrest of Kathy Rapp?

A. Yeah, one --

MR. DOOLITTLE: Your Honor, I don't see the relevance of this line of questioning.

MR. REATH: Establishing the reason he is in the case.

THE COURT: No, overruled.

A. One of the things that particularly concerned me was the Kathy Rapp incident, and I'm sure it has been discussed.

Q. In what respect?

A. Well, I was kind of you know, my initial reaction was, you know, that one of the lousiest things I ever heard of happening to someone, you know, coming into the dorms. And I thought—I thought it was lousy. (194) I thought it was outrageous.

Q. When you say having some one come in the dorm—

A. Well, I mean I thought that the way—I just thought the way that Miss Rapp was treated when she came in to try, you know, I mean a relatively peaceful—I mean wholly peaceful type, you know, demonstration for china and cookware, what have you, I don't think there was any need for the treatment.

Q. What treatment are you referring to?

A. Shoved up against the wall and—

MR. DOOLITTLE: Objection,

A. Handcuffed, taken away, having yourself practically, you know, injured, you know. I mean it was a little ridiculous. I mean I was a little bit—I was outraged at the whole thing and it really prompted my interest in the case. That was initially what made me want to become a plaintiff.

Q. And then subsequently you did have an opportunity to meet, I believe, with Mr. Sattel?

A. Yeah, Rich, Mr. Sattel came to one other person, we met with Mr. Sattel and another person who I guess is still a named plaintiff, Danny Altman, and who described to us, you know, a little bit more about the case, a little more about the proceedings, got a chance to read some of the material from the case. I (195) don't know exactly, I don't remember exactly what, but just some background on what was going on, some background on other cases in other states, you know, different things that had happened. Pennsylvania case and other things. And, you know, then I decided that I would be, you know, that that was—this was a right that I would be interested in having, you know.

Q. And when you say a right that you would be interested in having what do you mean by that, what kind of—

A. You know, before I went into it I had to ask myself would I really want to—want to be able to have this type of demonstration in my dorm room. Would I really want to be able to have anything I want in my dorm room. And I decided before I became a plaintiff that, yeah, I would like to be able to bring in, if I wanted to bring someone into my room to do whatever it really wasn't up to the university to tell me what I can and couldn't do because I'm paying, you know paying my bills, you know. They are not paying my bills to live in the dorm. And if I'm minding my own business there's absolutely no reason for the university to come in and tell me I can't bring some one in my room. Granted, it may be—perhaps it wasn't my inclination as a freshmen or sophomore to run out and have a cookware party in my room. But (196) when I, you know, when I gave it some serious thought I thought, yeah, there may come a time where I'm going to go out, be on my own the year after my senior year, and I was out on my own this year, and maybe I would like to price cookware, you know. Maybe it isn't the craziest thing in the world. Maybe I'd like to price cookware, maybe I like to price china. Maybe I'd like to learn a little bit about having a—run whatever minimal kitchen I will run when I get out of college the first year. And I thought that—I thought that, you know, for me I saw the broader

scope of it, even in this particular incident I would be willing to and I will want to sponsor one of them in my dorm rooms.

Q. And you are aware of the fact that you are prohibited from going so under the regulations now in effect?

A. Yeah, I became aware of that, yeah.

Q. Now, you are familiar with, are you not, with the deposition of Dr. Hosteter?

A. Yes, I am.

Q. And I have two very limited portions of Dr. Hosteter's testimony that I want to read to you and then ask you a question or two about. I am reading now from the Hosteter deposition. After identifying the regulation in question, and I'm now reading from the middle of (197) page 21, and I directed the question to him about the clarification of what was meant by the word "commercial", commercial and such, and I said, "have you ever issued any clarifying bulletins or explanation as to the interpretation of any of the words in this regulation?" "Answer: No, I have not." "Question: Well, for example, what would be your definition of a private commercial enterprise?" "Answer: It would be an organization that deals in a product which the end result would be the making of a profit for that group, for that corporation and who would be seeking to come on campus to come into the residence halls for the purpose of selling that product." "Question: What about a service? Would a service be included within that definition?" "Answer: If it is a service outside the services that were already provided for, yes." "Question: Supposing there was a person who had a private job counseling service who for a fee would counsel students regarding appropriate jobs and job opportunities on graduation. And I'm assuming that job service counseling is a proprietary profit organization and they charge a fee. Would they be permitted to come on campus at the invitation of a student to meet with one or more students in the privacy of the (198) student's room to learn about that service?" "Answer: No, they would not." "Question: Why is that?" "Answer: That service is already provided for by the university."

Now, my question to you, sir, is would you state in what respect, if any, that prohibition would effect your view of what your rights and what you might want to do on campus with your residence room?

MR. DOOLITTLE: Objection, your Honor. I don't think this witness is in a position to answer the question, that question. Number two, whatever his feelings are about prohibitions really aren't relevant to anything that is before the Court and he shouldn't be allowed to give his opinion.

THE COURT: Insofar as your first objection, he certainly can tell what his own feelings are. He is in a position to do that. As to the second part of your objection, I am going to hear it and I will determine whether it is relevant or not.

A. How the prohibition I think it would—how it would affect my rights if I, you know—and I'm familiar, you know, I read through parts of the deposition. In other words, if I want to bring in—if I had a personal concern that I would want to share—
(199) Q. If you will concentrate for the moment on the question of the job, the one that's identified here.

A. Right.

Q. And the question is is that an opportunity that you as a student feel that you would like to have the option to bring in? For example, a job counselor?

A. Yeah, definitively, yeah, I think it would be.

Q. Explain why?

A. Well, I think it's a service, something that possibly I wouldn't I'd want to get top quality advice, you know about a future career, about a job. And maybe it's something I have to pay for. Maybe it's some one I want to bring in and talk to directly.

Q. And you are prohibited from doing that by the university regulations, is that correct?

A. That's correct.

Q. All right. Now, then I went on and I will read just one other small portion. "Supposing a group of students wants to invite a stockbroker to meet with them and give them advice regarding investments to make in the stockmarket. Would that be permitted?" "No, it would not." Now what is your position—

A. My view would be similar. That would be something that I would be interested in doing, you know and if so interested I would want to be able to do that.
(200) Q. And then, having discussed the fact that stockbrokers were prohibited I said, "Question: The same thing I take it would apply then if the student or group of students wanted to invite a lawyer to their room to give advice on legal matters?" "Is it for a fee?" "Yes." "Answer: In a student-client relationship?" "Yes." "Answer: I would say it would not be allowed. There probably would be a more appropriate place for them to meet." "Question: They would not be allowed to meet in the student's room?" "Answer: In the residence halls?" "Question: In the residence halls themselves." "Answer: Right."

THE COURT: It was "in the residence themselves," not the residence halls.

MR. REATH: Thank you, sir.

Q. And what is your view as to whether you would want to exercise and should have the right—

A. I certainly feel that I would have the—I should have the right to be able to bring an attorney into my room in an attorney-client relationship.

Q. And I have just one more. All right. We can skip that. Now, you mentioned the fact that you had seen an AFS demonstration and stated very briefly the fact that that is something that you would like to do as a host to have one of those parties?
(201) A. Definitely.

Q. And you have also seen, have you not, the tape of a sample demonstration that have been offered and received in evidence here?

A. Yeah.

Q. And from what you observed of the demonstration that was going on when your girl friend was there and you were in and out and—I am not asking you to direct yourself to the content, but in terms of the overall format of what was going on how would you characterize what you saw with the sample tape?

A. Briefly, it was very similar. I mean I couldn't—I couldn't testify as to the content. I was, you know, I was in for about a minute or two minutes. It was a similar format, people sitting around the room talking to, you know, someone, she was reading off different things about—

Q. All right. And how would you describe or characterize one of those sample sessions in a dorm room compared with other kinds of activity that routinely occur in the dorm room?

A. I would say—I will say it's a relatively quiet type thing. I guess if, you know, compared to what goes on in the dormitories I would even classify it as a quieter get together, you know.

(202) Q. And give me just one or two illustrative examples that will give us a range of activities that have a potential intrusive or noise effect on the dorms?

A. Stereos, parties, I mean, you know, more, you know, more social gatherings, you know. They are much, you know, much louder, TV blaring, you know.

Q. And finally insofar as the content of an AFS demonstration goes you are now familiar, are you now familiar, are not—

A. Yeah, I viewed the tape.

Q. And would you state to his Honor the extent to which you found from one of those demonstrations a value to you, whether it be educational or social, other than the opportunity to merely purchase products?

MR. DOOLITTLE: I object, your Honor, on a number of grounds.

THE COURT: What are your grounds?

MR. DOOLITTLE: Number one, I think he already testified that he walked in and out of a demonstration.

THE COURT: He said he reviewed the tape here. He is talking now about the tape.

THE WITNESS: Talking about—

THE COURT: That was the question directed towards the witness.

(203) MR. REATH: Yes, sir. He said he is familiar with the content of what is offered and what takes place.

MR. DOOLITTLE: I was under the impression the question was directed at the demonstration in a broader sense as if he had attended one. In any event, and I also object on relevancy grounds because as it has already been pointed out on a number of occasions whether AFS presentation is educational or truthful or not is not an issue in this case. Because the regulation doesn't seek to regulate the speech or truth or falsity.

THE COURT: I don't think it is offered in that regard. It is offered to have this witness—as to the educational content, in his opinion, contained in such a message. That's just one opinion. It is relevant.

THE WITNESS: My opinion of the educational content?

BY MR. REATH:

Q. Yes.

A. From the type—I mean, there was some reliance and there were some time spent on what generically comprises good cookware, what generically comprises good china. And I would say a surprising amount of (204) time was spent on not only this is what we have, but this is what is good and convenient. And I think that, you know—and just a discussion of, you know, of different aspects of cookware, different aspects of china, I think that a good portion, you know, not a minimal portion of the demonstration is spent on general knowledge.

Q. Anything else in terms of value of the experience, the opportunity for group—

A. I mean for some one whose kind of busy and who possibly, you know, for my self possibly wouldn't you know who wouldn't get the chance to go out and get out to the stores, I don't have a car or anything, to get to the stores and look at different things

for purchase, it's convenient. It's a convenience to have some one—if I want to ask someone in and they can come in and my friends and I could benefit from being able to view the demonstration, you know, it's convenient. There is some general knowledge to be gained from it and it's a different experience, you know, it's something different.

* * *

Cross Examination of Steven Gawley.

(209) Q. What about do you have a view with respect to the use of a room, residence hall room by a student to conduct a business of his own on his own behalf of some type, I don't know, selling t-shirts or jewelry or whatever?

A. My opinion as to whether it should be allowed or not?

Q. Yes.

A. I don't think so. I don't think that's appropriate. I mean I wouldn't want to be someone's room mate who was running a business.

* * *

Cross Examination of Katheen A. Rapp.

(225) A. "If a show is not permitted in the dorm, normally this will not happen at state colleges, suggest one of the following locations to the hostess. A friend's apartment, local church meeting room, YWCA meeting room, nearby hotel, motel. If it is necessary to rent a small meeting room, you are responsible for the arrangement and the cost, if any. Other campus locations, if the show cannot be held in the dorm there are other alternatives on campus, Newman Centers, Westly Centers and Student Union."

Q. What benefit is it to the representative, if any, of a qualified show?

THE COURT: I didn't year your question, counsel.

Q. What benefit is there to the sales representative if the show is qualified?

A. During your trainee period, which is approximately a three month period, the new representatives are on a salary kind of arrangement where they need to put 13, 15, I can't remember, generally about 15 qualified shows during the month. Which

consists of at least 20 working days. And they can put on two or three shows per day. And a qualified show doesn't matter how many sales are made, just ten

* * *

(230) Q. What did you mean they go back?

A. Perhaps they go back to their own room to get their roommate or invite a friend who also might be interested in coming to the show.

Q. That makes reference to a donation to save the children?

A. Correct.

Q. Do you know how much that donation amounts to?

A. I don't recall. It was about—at one point it was about a dollar per person who came to the show, which was enough to—

Q. Perhaps you could look at Roman XII, page 12. It might refresh your recollection.

A. Roman XII, page 12. Is that what you would like me to read?

Q. No, I just want you to refresh your recollection. About how much goes to save the children?

A. A dollar will be contributed for each attendee with(231) cost shared by the representative and the company.

Q. Would you read this part, the next sentence, to yourself. Does that refresh your recollection as to how much is donated to save the children?

A. It says, "for future flexibility our arrangement is that of the money donated for each attendee half is committed to save the children. The other half may be donated to a different charity. This gives us flexibility in dealing with local fund raising projects which can be advantageous."

* * *

Redirect Examination of Kathleen A. Rapp.

(245)Q. You told us yesterday about what happened on the day that you were arrested, correct?

A. That's correct.

Q. Now, did you go back to the campus the next day?

A. Yes, I did.

Q. And I want you to tell us very briefly what happened when you went to visit with some of the girls in the room and whether or not you had a subsequent encounter with the SUNY police?

MR. DOOLITTLE: Objection, your Honor. Irrelevant.

THE COURT: Well, I will receive it. But make your objections to the questions as he goes (246) along.

A. The next day I called my hostess from the night before and had told her about the students' rights case that we were in the process of litigating and asked her if she would like some more information about it, would like to hear more about it. And she said she certainly would. She was very embarrassed by what had happened the night before.

Q. So you went back?

A. Yes. She invited me to come back.

Q. Tell his Honor what happened when you were meeting with her and the other students in the room and the encounter that occurred?

A. There was four or five students in the room, including my hostess and I was there. I had brought my baby with me, only three months old at the time. And I was there about 45 minutes explaining as best I could about the case and what had happened and their rights, and she was a freshman and she had mixed feelings. And so at the end of 45 minutes she said I understand—

Q. Don't tell us what she said.

A. Anyway so I left. And as I was walking out with my baby one of the other girls who had been at the show looked out the door and said, "you are back with (247) your baby. Come in." So I walked in and they asked me what I was on campus for. Another girl who had been in the room came down and I was explaining to them the students' rights case and they were very indignant about what had happened and about not being—being in a place where they were denied their constitutional rights of freedom of choice. And we were talking about it and they were writing up a petition when all of a sudden down the hall came two SUNY policemen marching down the hall and came up to

the door where I had been, rapped on the door. and said, "we understand Kathy Rapp is here. Where is Kathy Rapp?" And he said—she left, oh, they are looking for you, and slammed the door. And they didn't know what to do. And I said well, this is not the way to conduct this. So I opened the door and I said, you know, here I am. Are you looking for me? And he said you are persona non gratis on this campus and I was told if you were back here you would be subject to arrest for criminal trespass. And he read me my rights and—

Q. Your Miranda—

A. Correct.

* * *

Direct Examination of Edward R. Detweiler.

(253) Q. Mr. Detweiler, what is your name, sir?

A. Edward R. Detweiler.

Q. And you are a student at what campus?

A. SUNY at Cortland.

Q. And are you active in student government?

A. Yes, I am.

Q. And you know about this case and you are one of the party plaintiffs, is that right?

A. That is correct.

Q. And I have explained to counsel and for the benefit of all of the students in the courtroom we are a little short on time and we want to get you all on and off and back to your studies. So we may not cover as many subjects as we had planned. So I am just going to ask each of you to come forward and state to the Judge, first of all, were you here this morning and did you hear the testimony of Steve Gawley?

A. I heard part of it. I was called outside in the middle of it.

Q. Now, would you tell his Honor in a few words why you are a plaintiff in this case and what you personally feel is important to you in terms of the issues raised? And use your words to say that to his(254) Honor.

A. The reason I got involved in this case was at the time I was doing a door to door education and finding people to write cards

against the Solomon amendment which linked people's federal aid with registering for the draft. In doing so a dorm director came up to me and had public safety behind her and asked if I had permission to go door to door to ask people about this question. And I did not know I had to have that permission originally, and didn't see why I had to. And, of course, she said since I said I didn't she said that I had to leave and, of course, I did. Because I was told to. Upon leaving I went back to—I was doing this with the New York Public Research Group. And I went up to our project coordinators and asked her what I should basically do about this. And when I got up there we talked for a while and then Carl Weinberg came in and he told me about the case with Kathy Reed—

Q. Kathy Rapp.

A. Rapp. I'm sorry. Kathy Rapp. And I felt that this was kind of a similar case and I was appalled by the fact that she had been thrown out for almost—thrown out, you know, the same reason, basically. And she was not allowed to speak in dormitories.

(255) Q. And in what respect do you feel that the regulations as enforced and applied infringes on your rights as a student?

A. Okay, you know, infringes on my right of speech. I am not allowed to express myself openly in the dormitories, in a place where I'm paying my rent just like I would pay rent in an apartment building. It goes against the policy of the school because it says that that we are allowed to have, you know, open association with people and here we are not allowed to associate, have a visitor come in and we can't associate with people that are having commercial, you know, receiving commercial benefits, I guess, from coming into the dorm.

* * *

Direct Examination of James B. Cullen.

(257) Q. Give your name and address again, Mr. Cullen?

A. James B. Cullen. And I'm a resident at SUNY College at Cortland.

Q. And you are active in student government?

A. Yes, I am. I'm president of the student association at Cortland.

Q. How long have you held that position?

Q. I was elected this year. Approximately a month now.

Q. And you spent two years in the dorm, freshmen and sophomore years?

A. Yes, I did.

Q. And you are a plaintiff in this case?

Q. Yes, sir.

Q. Would you state to his Honor why you became a plaintiff in the case and the interest that you are involved in that you feel are infringed or otherwise affected by what the university prohibits?

A. Well, I was very active in the student association of the State University last year. And I was very active—I'm active on the student senate and what not. And I became aware of the case through Mr. (258) Satell and Ed Detweiler. And I became very interested in the case because of that infringement upon my rights, my constitutional rights of assembly and speech and especially since I'm a political science major and hope to attend law school some day. I was well aware of, you know, my rights as far as that was concerned. And it really bothered me to know that I couldn't invite somebody such as an attorney or some commercial person, representatives of a group, say AFS, to my dorm if I so choose simply because it was college policy. I was kind of offended that it was—that the college was acting in a parental fashion like that and having so much control over my life. And I didn't appreciate that and that's really why, you know, I got involved in the case.

* * *

Direct Examination of Philip J. Botwinik.

(260) Q. Mr. Botwinik, will you state your full name, please?

A. Philip J. Botwinik.

Q. And you are at what campus?

A. I attend SUNY at Albany.

Q. In what year?

A. I'm a junior.

Q. And you are a plaintiff in this case?

A. That is correct, I am a plaintiff in this case.

Q. and why did you decide that you wished to be a plaintiff and present testimony in this case?
(261) A. Well, I have always been very active in the student government at Albany and a friend of mine who is a student association president elect, Steve Gawley, had mentioned this case to me. And I am very interested in the rights of students in the dorms being, in other words, tenant-landlord relationship is very important to me and I asked if I could get involved.

Q. Now, putting aside the AFS issue for a moment as though AFS were not involved, okay, are there any reasons that have no relationship to the AFS demonstration as to why you as a student want to be involved in this case?

A. Yes, definitely. I feel the tenant-landlord relationship that should exist on campus with the role of administrators and students is infringed upon in many instances. And I think the rights, the constitutional rights of students should be upheld. And this case I believe depicts an issue that is of grave importance to many students living in the dorms and outside the dorms.

Q. And does one of those issues involve the question of freedom of choice and your right to make choices as to how you would use your dormitory room and the people that you would care to invite to come there?
(262) A. I feel the right to be able to do whatever I want within my own room or home away from home so long as that is legal and not infringe upon the rights of others is very important. And the right to assemble and to discuss whatever student matters of importance is—is essential for student empowerment and for student learning.
Q. And you understand that the restriction that is being opposed in this case is one that says that you can invite certain kind of invitees to your room but you can't invite an invitee if that person is offering a professional or commercial service or product? Do you understand it that way?
Q. Yes, I understand that.
Q. And that would mean a life insurance salesman, who wants to tell you about life insurance?
Q. Yes.
Q. Or a lawyer that you want to talk with?

A. Yes.
Q. Or a job counselor?
A. Yes.
Q. Is that right?
A. Yes.
Q. And you feel that it's wrong that you shouldn't be permitted to do that?
(263) A. I think that's an injustice.

THE COURT: Well, let's just make clear though it is only a person who is there and benefiting financially.
THE WITNESS: That's correct.
THE COURT: Or has a financial benefit at stake.
THE WITNESS: Right.
THE COURT: If you invited a lawyer friend of your father or somebody over to discuss a legal career there is no prohibition against that.
THE WITNESS: I understand that.
THE COURT: Or medical, etc.

BY MR. REATH:

Q. Now, one other matter that I believe that you have some photographs that you took at my request as relayed to you through either Mr. Satell or somebody through AFS, is that correct?
A. That's correct.
Q. And the exhibit is Plaintiffs' Exhibit 42 and they are some photographs which I have shown, your Honor, to opposing counsel. Without taking the time to go through these photographs one by one tell us what they are and what they illustrate and then we will move on.
(264) A. The photographs illustrate activities that go on in the dormitories that are non-academic, particularly pictures that I've taken of a game that is organized by the residential life staff at Albany which is a Division of the Student Affairs part of the vice president's office, Dr. Frank Pogue. And this game that's organized by the residential assistants is called murder. And each student is on a 24 hour alert to actually shoot another student

with a water pistol or with a rubber band and, in other words, the 24 hour game is constantly going on and people are running into each other's rooms, into each other's suites and throughout the dorms. And that's a particular example of a game that is organized and facilitated by the actual residential life staff. I took a few other pictures from different dormitories just relating to activities like jujitsu and other kinds of interests that people are able to develop within the dormitories, both in suites and in lounges and in their rooms that are non-academic. Essentially the major point that I wanted to get across is that most of my friends and myself study outside of the dorms, outside of our rooms, outside of our suites and that the residence halls in no way, shape or form that (265) I've seen on my campus exemplifies study areas.

Q. Now, one last question about the AFS matter. You are familiar with an AFS demonstration, correct?

A. I am.

Q. And at the time that you were living in the college dormitories were you interested in having and participating in such a demonstration?

A. I definitely was.

Q. And what particular area interested you? Was it the matter—the opportunity to buy or was it some interest?

A. Particularly buying, because through scouting and other cooking jobs I've had throughout high school and college I've always loved to cook and I've always loved to be able to develop the skills. And I would have liked to have looked into tupperware, tableware, and those kinds of areas because I've always prized these items and I always worked with these kind of items.

Q. Now, one of the matters that is discussed in a formal presentation is the availability of credit, is that right?

A. That's correct.

Q. And do you have any personal knowledge or experience about the importance of credit to young people and (266) whether they are freely able to get credit outside of the kind of offer that is made available by AFS? Yes, I have. my parents have always thought that being independent, being able to establish your own credit is very important. So they started with helping me get credit cards to establish, you know, paying for my own expenses and then I've also tried to get different kinds of credit

cards at local department stores like Macys and Jordan Marsh and Filene's.

Q. Those are where, in the New York area?

A. Upstate at Cross Gates Mall and also downstate.

Q. And what was your experience?

A. I've had difficulties obtaining credit at most of the major department stores both downstate and upstate because they seem to want to give credit to an older clientele and might be a more steady customer or might be buying goods more regularly as opposed to a student just needing certain things in certain periods of my life.

* * *

Direct Examination of Laura Brezosky.

(272) Q. Miss Brezosky, may I call you Laura?

A. Yes.

Q. Would you state your name and your legal residence?

A. Laura Grace Brezosky. I live off campus, 529 Washington Avenue, Albany, New York.

Q. And you are at what campus?

A. Albany. State University, New York.

Q. I have a little hearing problem. If you could—

A. State University at New York.

Q. Pardon me?

A. State University at Albany.

Q. Albany, okay. And you are a witness in this case and not—you are not one of the party plaintiffs, are you?

A. I'm not listed, no.

Q. And are you active in the student government?

A. Yes, I am.

Q. And I think you showed me a viewpoint '85-'86 where you are—

A. '86-'87.

Q. Excuse me. Is it '86-'87?

A. Yes, it is.

Q. When you get your pictures in something it's fair to say you ought to have everybody know about it.

(273) A. Well, my picture wasn't in it—

Q. You were referenced?

A. My name is in it.

Q. Plaintiffs' Exhibit 43, where does your name appear in Viewpoint '86-'87?

A. I have to find it. I don't know the pages. Page 22.

Q. And in what is your identification there? I am the educational affairs director for the student association.

THE COURT: Educational Affairs Director for the Student Association?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. REATH:

Q. And what are your general duties and responsibilities as Educational Director?

A. Well, I manage test bank, I manage a publication called Skate, which is Student Course Teacher Evaluations. I'm the university student liaision for the students.

Q. And what is your major at college now, your major area of interest or interests?

A. I'm a double major. One is English, my other major is business. Within business I have a double (274) concentration of finance and marketing.

Q. Finance and marketing?

A. Yes.

Q. Now, you are familiar with what an AFS presentation is, are you not?

A. Yes, I am.

Q. And would you state to his Honor why you would have a particular interest in going to see an AFS demonstration?

A. I would be interested first because I would just be interested in knowing what makes fine china or fine crystal. Also, just to see how the company works, just to be able to apply any knowledge that I have learned so that anything that I learn now will help me when I get out into the business world.

Q. Are you taking any courses in marketing or consumer—

A. I'm taking consumer behavior and I'm taking international marketing.

Q. And to what extent do you feel that what you are learning in the classroom would have an application and interest to you in observing or participating in a demonstration?

A. Well, just to know what I'm learning in school has any validity outside the classroom at all, and just (275) to know that if I can look at a textbook and I can identify with what they are saying right now it makes me feel good that when I graduate I will be able to get a job and I will know what I am talking about.

MR. REATH: I have no other questions.

THE COURT: Mr. Doolittle?

Cross Examination of Laura Brezosky.

Q. I didn't catch the part about where you lived. Do you live in a dorm or off campus?

A. Off campus.

Q. You have your own apartment or share an apartment?

A. I share an apartment.

Q. Have you volunteered, requested the opportunity to host an AFS demonstration?

A. No.

Q. You haven't?

A. No.

Q. Has AFS inquired as to whether you would be interested or not?

A. I would be interested, sure.

Q. But they haven't asked you?

A. Not yet.

MR. DOOLITTLE: Okay. Perhaps Mr. Satell can have someone call her. Thank you very (276) much.

(THE WITNESS WAS EXCUSED)

Direct Examination of Jeffrey Zellan.

(Jeffrey Zellen was duly sworn.)

DIRECT EXAMINATION BY MR. REATH:

Q. Jeff, state your name and address, please.

A. Jeffrey Samuel Zellan. My address is Box 472 Dutch Quad, SUNY, Albany.

Q. And you are one of the plaintiffs in this case, is that right?

A. Yes, it is.

Q. And just take a word or two to his Honor why you felt that there were issues in this case that you would like to be a part of.

A. How I got involved?

Q. Well, my question, why are you in the case and what is it about the case that—

A. I was approached by Steven Gawley in the spring of 1985. He was the president elect of the student association and I, too, was active in the student goverment. He gave me some information about the Penn State case. He wanted me to read it over. I did, and subsequently he asked me what I thought about it. And I said, you know, it seemed pretty—I liked it. And he wanted to know if I wanted to be involved with the case myself and I said that (277) I'd be interested. And I met with Mr. Satell and Mr. Reath and I became involved with the case.

Q. Now, in your own words, what is there about this—substantive issues in the case that personally interest you where you feel you have a personal interest in the stake in the outcome of the case?

A. Well, the one issue is that I simply felt that I should be able to invite guests that I choose to invite that, you know, not disruptive and conduct themselves in a legal fashion.

Q. Now, did you—at my request it was communicated to you through somebody else, make a survey of some of the bulletin boards at the Albany campus?

A. Yes, I did.

Q. And what is that exhibit? And I show you a document marked for identification as Plaintiffs' Exhibit 28. Does that contain copies of all—or examples of the kind of material that was on bulletin boards in residence halls?

A. Yes, it is.

Q. All right. And without going through all of them would you just explain to his Honor a representative sample of the kind of solicitations advertisements that were posted on the bulletin boards in the residence halls?

(278) A. Specifically?

Q. Just categorize them in a word or two.

A. These are advertisements for different items for sale from students, other students, telephones, books. There are posters that I have seen, tutorial service, although they are not among these right now. This was passed around under the doors to build your own computer from another company that allows you to build your own computer. I guess they give you the parts. Those things are common on the board. The board, the bulletin board in the dorms serve as a sort of a market place.

* * *

Direct Examination of Linda Byrd.

(297) Q. Would you state your name for the record, please.

A. Linda Byrd.

Q. And where do you live?

A. I live north of Tampa, Florida.

Q. Now, Linda, I neglected to explain to you the dynamics of the courtroom. I am asking the questions but you should address your answers to his Honor and that kind of makes it difficult for you, and also if you would try to keep your voice up because the court stenographer has to take everything. And everybody else in the courtroom would like to hear what you are going to say. So I won't think it rude if in answering the questions you direct them towards his Honor rather than me.

And tell his Honor just a little bit about yourself as a person, where you live, married, children, that kind of thing.

(298) A. I live in Holiday, Florida, a small town north of Tampa. Married, two young children.

Q. You are employed by AFS?

A. Yes, I am.
Q. And what is your present position?
A. I'm a district manager.
Q. What area or territory do you cover?
A. I work directly with the representatives in Florida and also—
Q. Try to keep your voice up just a little bit.
A. Florida, Georgia, South Carolina and Alabama.
Q. How long have you been working with AFS?
A. I have been working with them for six years.
Q. Now, would you tell his Honor very briefly about your educational and academic background.
A. Certainly. I have an undergraduate degree in health education from the State University of New York College at Cortland.
Q. Where did you go to high school?
A. Comack, New York. Went to Comack High School.
Q. And on graduating from high school you then enrolled at Cortland?
A. Yes, I did. I received a regents scholarship and went to Cortland full time.
Q. And then did you get your degree from Cortland?
(299) A. Yes, I did, in health education.
Q. And you graduated from Cortland. Then what did you do?
A. After that I left and taught school for three years.
Q. Where?
A. Long Island, several different school districts.
Q. The public school system?
A. Yes. Taught at Comack for a year, Kings Park for a year.
Q. And then?
A. After that I decided to go back to graduate school full time to receive my permanent teaching certification. I returned around—did my graduate work at State University of Cortland, as well, where I received a masters degree in public health and health education. And at that time I was employed as a graduate student. So I taught courses at Cortland, as well, while I was a student.
Q. And then what?

A. Well, when I left there I worked only part time for a year and then after that I began working with American Future Systems full time.
Q. Just in a word or two, how did you come to become connected with AFS?
A. I was looking to change careers at that point (300) because I had a young child and I wanted to have an opportunity to be at home most of the time. But I wanted to use the teaching skills I had. I enjoyed that very much. We had moved to Albany, New York and at that time I answered an ad in the paper and I began working with them to put on the consumer education presentations where I felt I could use the skills I had in teaching.
Q. I see. And you started with AFS as a sales representative?
A. Yes, I did.
Q. Now, did you have any kind of an instructional program before you were qualified to be a sales representative?
A. Oh, absolutely. Prior to doing anything in the field I went through a five day training program which was held outside of the home office, very intensive program where I learned exactly how to put on the presentations with the product knowledge and all of the different aspects of the job. After that I went back out in the field and I worked in a three month training program working very closely with the district manager.
Q. Who was your district manager at that time?
A. Kathy Rapp.
(301) Q. That is the same woman that testified in court previously?
A. Yes, it is.
Q. How long did you remain in the New York area?
A. I worked in New York for one year.
Q. And then what happened?
A. I received a promotion to district manager and decided to relocate at that point and moved to Georgia.
Q. And then to Florida where you now live?
A. That's correct.

Q. Now, and I think we covered the territory, would you identify for his Honor the major schools or colleges or universities where you or representatives under you sell and are permitted to sell—make your demonstration and sell products?

A. Certainly. The University of South Florida, Eckert College, St. Leo College—

Q. Not too fast. Everybody has to take this down. Go ahead. The first one was?

A. University of South Florida.

Q. Yes.

A. Eckert College.

Q. Eckert?

A. E-C-K-E-R-T.

(302) Q. Okay.

A. St. Leo College.

Q. Where is that located?

A. St. Leo, Florida.

MR. DOOLITTLE: Your Honor, may I interject? I am not clear of the relevance of this particular—

THE COURT: Make an offer of proof. What do you intend to prove through this witness?

MR. REATH: To show many other state universities have no difficulty at all in accommodating to the program. And I think it is relevant as background information, as well, to show the nature of this company and—

THE COURT: I will take it as background information.

MR. REATH: Yes, sir.

BY MR. REATH:

Q. Go ahead.

A. Also the University of Central Florida, Florida State University, the University of Miami, University of Georgia, University of South Carolina, Auburn University.

* * *

(312) Q. Based on your knowledge of the AFS method of operation would you state to his Honor from AFS' point of view your view as to whether these restrictions that I spoke of are reasonable.

A. Well, I find particular—

Q. First of all, just answer the question. Do you find them reasonable or unreasonable?

A. Unreasonable.

(313) Q. Now, please explain to his Honor why?

A. Particularly in regard to time. I mean, this is my full time job. It's the way I earn my living. With the hours regulated from 2 p.m. to 9 p.m. I would go from a full time person to a half time person. I would have the ability to only do half the presentations I do right now.

Q. And what about the availability of the students and your ability to reach them at those hours and no other?

A. Very, very difficult.

Q. Why?

A. Because it's very difficult to pick times that the students will be there. We always choose a time for the show, we give them the opportunity to pick the time that is the best for them, But for them to have the responsibility the day prior to give up more of their time, you know, in order to be running around getting the signatures, getting all of the forms, I think would be very, very difficult. I think that would reduce the number of presentations that I would be able to do.

* * *

Direct Examination of Christy Kalthoff

(316) Q. Miss Kalthoff, where do you live?

A. Bloomington, Indiana.

Q. Bloomginton, Indiana? Try to keep your voice up.

And, Miss, Kalthoff you are currently employed by AFS?

A. I am.

Q. In what capacity?

A. I'm a district manager for them.

Q. And in what area do you cover?

A. I cover southern Indiana and Kentucky.

And what kind, in a word or two, are the duties, responsibilities of the district manager?

A. I hire people and manage them, training them after their initial training by the company, and work with them in the field and do presentations of my (318) own, as well, with students on a regular basis.

Q. Do you also from time to time review their performance in the field?

A. Constantly, regularly when I work with them.

Q. Now, would you tell his Honor very briefly just a word or two about you as a person, who you are, what you do and then we will go into some other questions.

Q. Okay. I have been in Bloomington, Indiana for two and a half years. My husband is a graduate student working on a Ph.D. at Indiana University. Before that I was an admissions counselor with a college in Michigan.

Q. Now, you are married. Do you have any children?

A. No, children.

Q. No children?

A. No, I don't have.

Q. And you live at home with your husband?

A. I do.

Q. And your husband is a professor?

THE COURT: Graduate student. And he teaches and takes classes.

THE COURT: What difference does it make what her husband does?

MR. REATH: Quite right.

(319) BY MR. REATH:

Q. And just tell his Honor briefly about your schooling, where you graduated from and high school, college, any post graduate training.

A. I graduated from high school Newport Harbor High School, Newport Beach, California. I have a BA in economics and history from Hillsdale College, Hillsdale, Michigan, and I have a few courses toward a masters in history at Indiana University.

Q. And how did you come to have contact with American Future Systems?

A. I moved to Bloomington, Indiana, was looking for work, responded to an ad in the paper and interviewed with a manager with American Future Systems.

Q. Do you have the same—you heard the testimony of Linda Byrd?

A. I did.

Q. And did you have the same basic kind of training that she testified to?

A. Exactly the same training, beginning with a five day training program in Philadelphia and then since then continual training in the field by my manager.

Q. And who do you report to?

A. Marty Sysis, one of the vice presidents in the home (320) office.

Q. And in turn Mr. Weinberg, Carl Weinberg?

A. Yes.

Q. And did you tell us the territory that you cover?

A. Yes, southern Indiana and Kentucky.

Q. Would you identify for us briefly the list of the major schools and colleges where you are permitted to put on your sales demonstrations?

A. Certainly.

MR. DOOLITTLE: Objection, your Honor on relevance.

THE COURT: Overruled.

A. Indiana University, Indiana State University, Ball State University, University of Kentucky, Eastern Kentucky University, Morehead State University. Those are the major schools. Many smaller schools, as well.

* * *

(324) A. I think they are unreasonable. As Linda mentioned it takes—cuts the time that we are able to be on campus doing shows, reduces that substantially. The requirement to schedule—notify, register 24 hours in advance, for most of us we live a ways away from out school, requires additional drive time and that really adds up to a substantial amount of running around. And besides we come at the convenience of the students. And most students are ready for study breaks at 9 o'clock or later.

Q. In terms of setting times for the shows, to what extent do you have to take into consideration the convenience and wishes of the students?

A. Virtually completely within the range of what my travel and such will allow.

Q. And what has been your experience about the setting of the shows that have to be completed before 9 o'clock?

A. It's frustrating to them because afternoons and the early evening hours they are either involved in classes or eating dinner. And/or doing a little bit of studying. And it's later in the evening when they—9 o'clock is the most popular time to have a show, by far. Six o'clock and 9 o'clock.

* * *

Cross Examination of Christy Kalthoff.

(325) Q. What is the policy of AFS with respect to how they get on campus and whether there's any instruction about randomly knocking on doors in student dorms?

A. Our absolute policy, our people are trained to do all of our programs are prescheduled. We contact hostesses or contact individual students. If they are interested in hosting a show then we schedule a time with them, get back with them to verify the convenience of that time and when and where we will meet them.

Q. Are they permitted to go on to a campus and randomly knock on doors in trying to drum up interest?

A. No.

MR. REATH: Thank you.

CROSS EXAMINATION BY MR DOOLITTLE:

Q. In your area of Indiana and Kentucky are you aware (326) of any schools that don't permit AFS to give presentations on the campus? A. No, I am not.

Q. You are not aware of one single school in two states?

A. That does not allow us to do presentations on campus?

Q. Yes.

A. No, I am not. Some of the private schools I'm not familiar with their policy.

* * *

Direct Examination of Mr. Weinberg.

(336) A. Well, the reason we don't have a manager currently actively recruiting here in New York State is because we found the regulations of the State University so onerous that, frankly, I wouldn't want to put, you know, as they currently stand, I wouldn't want to put one of our managers through that.

Q. And are you directing that answer to the testimony that was given previously by the Cortland—

A. Cortland regulations, amended regulations, yes.

Q. And you heard the testimony of two of the representatives about it. Do you have anything to add to what they have said?

A. You mean Linda's and Christy's—

Q. Yes, about unreasonableness, their view of the unreasonableness of those regulations.

A. It certainly seems unreasonable to me.

Q. And for basically the same reasons that they stated?

A. Yes.

* * *

Cross Examination of Mr. Weinberg.

(343) Q. Approximately.

A. About 20 at the moment.

Q. About 20. At page 13 of the transcript of your deposition in response to the following question, "approximately how many employees are there?" "Answer: In the booking department?" "Yes." "Answer: About 40."

A. Well, of course, these are two different questions because these are two different times. At the time you asked me the question last February there were about 40. At the current time there are about 20.

Q. So while you testified that your representatives don't go door to door in the campus soliciting invitations that, in fact, the booking department and your representatives in the area do solicit by calling students without an invitation from the student to call such?

A. Yes. It's like when I was in college and I wanted to have a date with a young lady or went to Barnard College, I would call her, and I would have to say that was frequently unsolicited.

* * *

(345) Q. Do you use any kind of advertising?

A. Well, advertising is a broad word. If by advertising you mean print or media advertising then the answer is no.

Q. Do you do hand billings or do you put posters up in dormitories or other locations?

A. For what purpose?

Q. Advertising, promoting your products or seeking invitations from students?

A. No, sir.

Q. Then essentially, and you can quibble with me if you want to, most of your contact with students seeking invitations is done by telephone?

A. Yes.

* * *

(354) Q. And you testified that the basis of the fact that you don't have a representative in the State of New York at the present time is because of the regulations of the State University of New York. What about Cornell University? Why don't you go to Cornell and seek to demonstrate to the students at Cornell? I the students at the State University of New York System are not

allowed to invite us into their dorm rooms for these presentations then I cannot recommend to one of our managers or one of our prospective managers they move to this area and try to make a living.

* * *

E.B.T. of Raymond Franco.

(372) MR. REATH: Yes, sir, which was taken on November 18, 1985. And I will represent to the Court that he stated that his name was Raymond Franco, 6 Chestnut Street, Cortland, New York. His position is assistant vice president for student affairs and director of residence life at Cortland. And he has held that position since 1980.

(373) At page 10 I read into the record the following: "Question: And I will represent to you that in the deposition this morning Mr. Hostetler stated that as that regulation," referring to the SUNY regulation, and this is interliniation by me, "is interpreted it prohibits any student to invite to his or her dormitory room a commercial invitee if the purpose of the meeting in the student's room is to engage in conversation relating to the offering for sale or sale of a product or a service being offered or sold by the invitee for profit. Would you like to have that read back or is that clear to you what I've said?" "Answer: I think it is clear." "Question: is that your understand?" "Answer: Yes." "Question: And is that the way the policy is implemented at Cortland?" "Answer: Yes." Then at page 12 I said similarly that, and referring to the prohibition, back to the quote, "would prevent a group of students from inviting someone either from the college or an outside person to come and offer them wedding invitations or Christmas cards or any kind of an offering for sale of products or services?" "Answer: Correct." "Question: And no distinction is made as far as the university, as far as the college is concerned between whether the person, the person having the commercial (374) product or services that are being offered, whether that person came unsolicited attempting to randomly knock on doors and gain entrance on the one hand or had been specifically and

positively designated as an invitee to come to a particular student's room at a particular time and place?" "Answer: That is correct."

Moving on then to pages 41 and 42—I'm going to skip, Larry, to the top of page 42. I'm identifying, your Honor, at the top of page 42 the Cortland policy and then I say at the top of page 42, "and then on page 16 under solicitation, which is referring to the Cortland rules, 'solicitation and/or sales by residents or outside agents is not permitted in residence or dining halls without the prior approval, of the vice president for student affairs.'" "Answer: my interpretation of this is, yes, to answer your question." "Question: In terms of the rule against solicitation or sales does that include services as well as products?" "Answer: Yes." "Question: So that would prohibit a student from using his room to tutor other students for a fee?" "Answer: Yes." "Question: And that would also prevent, as I read the regulation, a student from using his dorm room as a convenient place to sell personal (375) property to another student?" "Answer: Such as?" "Question: Books, bicycles, guitars?" "Answer: Absolutely." That's the end of page 42. At page 70—then we move on to page 70 and 71. The record would show that I had been giving a representative example of different activities that might be taking place in two student rooms, one social and the other non-social or commercial. And the question that I asked at the bottom of page 70 reads as follows: "So why the special limitation on AFS if they are a business invitee as opposed to a social invitee? Why can the social invitee have ten people and stay until 11 o'clock and the business invitee has to leave by 9? What is the rationale? What is the state's interest that is being preserved or protected by that restriction?" "Answer: I don't have any answer for that."

At the bottom of page 71, one other matter—let's see. Ninety-six. Yes. Now we move to 97 in the transcript. "Question: You do not draw any distinction in your institution between invited and uninvited business guests, do you?" "Answer: No.'" And then at 102, the record would show that we had been talking about an AFS demonstration and I then said at the top of page 102, "Question: Would you be (376) interested in seeing a tape of an

AFS presentation?" "Answer: No." "Question: Have you any reason to believe that the AFS people are unethical or use unfair, high pressure salesmenship?" "Answer: I have no information regarding that whatsoever." "Question: And you would have no basis to make such a charge against them?" "Answer: That is correct."

And then the last one, your Honor, at page 104, "Question: Based on what you know of an AFS demonstration and what you have heard you have no reason to believe that it is other than a quiet, peaceful, nondisruptive presentation, do you? "Answer: No."

"Question: And do you know enough about what is done to have any views as to whether there is any educational value in the demonstrations?" "Answer: No, I have, I don't know. I told you before I don't know anything about it." "Question: And you have made no effort to find out?" "Answer: That is correct." "Question: And you have no desire to find out?" "Answer: That is correct."

That completes the offer of the Franco deposition, your Honor. And if your Honor please, I would like to offer as part of the Franco deposition 23B, which is the Notice of the Deposition which identifies the scope and requests (377) under 30(B)(6) the university to designate the appropriate person. And Mr. Franco is the one who appeared at the university's election in response to the 30(B)(6) request. And that is Plaintiffs' Exhibit 23B. I move that into evidence.

THE COURT: Any objection?

MR. DOOLITLLE: None, your Honor.

THE COURT: Received.

* * *

Direct Examination of Howard Diamond.

Q. Mr. Diamond, where do you live, sir?

A. I live in Ivesdale, Illinois.

Q. And by whom are you presently employed?

A. I'm presently employed by the University of Illinois, Urbana-Champaign.

Q. Try to keep your voice up a little bit and direct your answers at his Honor, if you would. And what is your present responsibility at the University of Illinois?

A. I'm currently Special Assistant to the Chancellor.

(378) Q. And prior to that what position did you hold?

A. Prior to that for the prior ten years I was in a number of different studentlife positions at Illinois with the last one being assistant vice chancellor for student affairs at the Urbana campus.

Q. And we will come back to that in a moment. Before that let me get a little bit of background information, where you went to school, college and such background information.

A. I went to the University of Illinois, 1971, as an undergraduate student.

Q. A little slower and a little louder, if you would.

A. I went to the University of Illinois in 1971 as an undergraduate student and I never left there. I stayed on after my studies as a staff member and I have been a staff member there for over ten years.

Q. And would you just mention in a word or two any particular extracurricular activities that you have been engaged in in addition to any professional or employment job?

A. I am involved in a number of activities, including a lot of social service agencies. I've also been involved in a lot of student rights issues on campus both as a student and staff member. I also currently serve as the allocations chair of the County United (379) Way and as the co-chair of the United Way campus campaign.

Q. In terms of your formal education at the University of Illinois, what were your majors?

A. Majored in political science and policy.

Q. Now, would you describe to his Honor—well, before we ask you the positions at the University of Illinois, describe very briefly the University of Illinois, what it is, its size, etc.

A. The University of Illinois Urbana-Champaign is a land grant institution. We currently have approximately 36,000 students at the Urbana-Champaign campus.

Q. Can you speak just a little slower.

A. Sure. We currently have approximately 36,000 students at the Urbana-Champaign campus. We also have a very large residential population. We currently house approximately 11,000 students in our university owned residence halls. And another 6,000 students in what we call university certified halls which include fraternities, sororities and privately owned certified facilities.

Q. And would you take us through, if you would, please, the previously positions that you held that relate directly to student affairs and residential life?

A. My first responsibility in that area was as a staff (380) associate in the office of the vice chancellor. The vice chancellor had responsibility for all the formal student support services on the campus, including the housing division, health service and the like. Also the dean of students office, financial aid and the normal student support services. I changed from staff associate to assistant to the vice chancellor and then moved on to assistant vice chancellor, moving from a staff role to a line position and then left that position a year ago.

Q. And from July, '82 to August of 1985 you served as the assistant vice chancellor for student affairs, is that correct?

A. That's correct.

Q. And during that time what sort of a budget were you responsible for and what were the overall range of your duties and responsibilities?

A. I had a policy level position. I also had budget responsibility for a 72 million auxiliary and state budget of the campus, including a number of the students supports services, most of the student support services.

Q. And did that include, with the Court's permission I will lead slightly, housing, the illini union, intramural physical education, health services, dean (381) students, financial aid, career development and placement, student activities and counseling center?

A. I was not line officer to whom those divisions reported. I did have policy responsibility for a number of those operations and all of those reported to the vice chancellor for student affairs, and I was primary assistant.

Q. And I show you a vitae which is marked for identification as Plaintiffs' Exhibit 44. Was that prepared by you?

Q. Yes.

A. And is it correct?

Q. Yes.

MR. REATH: I offer it in evidence, your Honor.
THE COURT: Any objection?
MR. DOOLITTLE: None.
THE COURT: Received.

(PLAINTIFFS' EXHIBIT 44 WAS RECEIVED.)

BY MR. REATH:

Q. Now, what was your very first contact with either American Future Systems or Mr. Edward Satell? Wen was it?

A. The first contact was in 1979. I couldn't tell you the exact month. My first knowledge of American (382) Future Systems came from a phone call from a staff member of ours who was associate director of housing at the time, Mr. Frank Naska, who called me to say he had been having some discussion with Mr. Satell about the access that American Future Systems desired to have in our residence hall system. And since they were not able to resolve that it was being referred to me. Because one of my responsibilities for the vice chancellor was resolving major level policy kind of conflicts like that.

Q. And at that time when you first had the contact with Mr. Satell what was the regulation that the University of Illinois had with respect to the right of the students to host, for example, an AFS demonstration in their dormitory rooms?

A. The issue of the phone call that was raised related to the fact that we had a policy prohibiting commercial enterprises in the residence halls and the policy question that was being raised was, in fact, was that the type of thing being suggested by American Future Systems a violation of that policy or not.

Q. And would it be fair to say that when you had your first discussions with Satell it was in an adversarial relationship?

A. It would be fair to say to the best of my knowledge (383) every connection that I have had with Mr. Satell has been an adversarial relation.

THE COURT: Who is Mr. Satell again?

MR. REATH: Ed Satell, your Honor, he is the president and chief executive officer of American Future Systems.

THE COURT: Thank you.

MR. REATH: He is right here.

THE COURT: All right.

BY MR. REATH:

Q. And thereafter did you have some meeting with Mr. Satell at which he had made a presentation to you urging you to change your policy?

A. I don't believe I ever met Mr. Satell until I came here. I've had numerous phone conversations with Mr. Satell when he did do numerous presentations on what, in fact, he felt we should have as our policy and how he felt our policy should be interpreted.

Q. Did there come a time when you changed your policy?

A. Yes, we certainly clarified our policy. I authorized a revision of the policy.

Q. And would you state to his Honor the reasons why you made a recommendation for a change in the policy?

A. After reviewing the policy with a number of faculty, staff and students on the campus, which is something (384) that I tend to do, we felt that the concerns that we had as an institution involving commercialism on campus, which as I read the documentation I tend to share with the folks at SUNY, had to be a balance, at least to some extent, with enforceable policies and

with policies that didn't unduly infringe on the students' rights. So we try to do an interpretation that would both protect our interests and protect the student interests and be reasonable to enforce.

Q. Did there come a time when you reduced to writing a revision of your policy with respect to how to handle this problem?

A. Yeah, the formal way the policy was changed was a change in what we call the hallmarks, which is a publication that goes out to every student in the residence hall beginning the year and talks about both services they have and regulations from the residence hall.

Q. And would you describe the regulation to his Honor, what changes were made and how that—

A. I guess, if you have a copy, I would have to have it because I would like to have the wording exactly right.

Q. I show you Plaintiffs' Exhibit 47. And the other side, your Honor, has a copy of that.

(385) MR. DOOLITTLE: No, I don't.

MR. REATH: I gave it to you this morning. Excuse me, Larry. I did.

(A DOCUMENT WAS HANDED TO MR. DOOLITTLE.)

MR. REATH: I'm sorry. There was confusion on your staff. I thought you did have it. Apparently you don't. I apologize.

THE COURT: All right, continue.

BY MR. REATH:

Q. I show you now the document marked for identification P47. Is that an excerpt from the document—from the book that you talked about, Hallmarks?

A. This is the current version of Hallmarks. This is taken from this year's version.

Q. And would you read to his Honor the regulation that you currently have?

A. Under the heading of commercial sale, "sales representatives or commercial activities are not allowed to go door to door. Call your residence advisor or area office if you see one in your area. However, you may invite sales representatives to your room to see you as your personal guest if your roommate agrees. Sales representatives cannot make presentations in lounges or other hall areas. Facilities such as bulletin boards and tables may not be used to advertise (386) presentations. This restriction includes sales representatives or demonstrations involving magazines, beauty products, insurance, home products, wholesale ordering and the like. University property cannot be used for commercial enterprises."

Q. And is it a fact that pursuant to that regulation as interpreted and applied and enforced by the university that since its adoption AFS or any other similar type of enterprise may respond to invitations from students to host a party in their private dormitory room?

A. Yes, sir, with the stipulations as delineated in Hallmarks.

Q. I notice that—

A. I'm sorry. With the stipulations as delineated in Hallmarks, i.e. the roommates' permission.

Q. I notice that the last sentence of the paragraph relating to commercial sales says, "university property cannot be used for commercial enterprises," correct?

A. Right.

Q. Would you explain to his Honor how that sentence is interpreted and applied and used?

A. We have no interest in their being a significant commercial presence on campus and we are also concerned (387) with the educational atmosphere at our university. And one of the things that we specifically want to make sure we prohibit are students or others running businesses out of their residence hall rooms.

Q. Would you elaborate on that as to the kind of activity that the students are prohibited from engaging in in the sense that they would be using their room in a residence hall for commercial purposes of the student?

A. Sure. Both as a student and as a staff member I have observed with some regulatory student entrepreneurs to try things like setting up their own snack shop in their residence hall room, selling t-shirts out of their room and placing advertisements through the hall, things like that.

Q. And that is prohibited?

A. That would all be specifically prohibited, right.

Q. Would you state to the Court the extent to which in your view this regulation that you have at Illinois accommodates the various interests on a college campus that would include, one, the rights and interests of the individual student, two, the right and interests of the university community and, three, the rights and desires of commercial invitees?

MR. DOOLITTLE: I think I have an (388) objection objection to the question. I am not sure he is qualified to answer that question.

THE COURT: Well, do you have a view on such?

THE WITNESS: I certainly have a view at Illinois on how it does that, yes, sir.

THE COURT: Well, all right. Go ahead, answer it if you can.

A. The goal of the policy as developed was to meet the needs of the campus in terms of protecting our integrity. And we feel it does that. While at the same time understanding that the student has certain rights, particularly within their own residence hall room, as long as the activities were lawful. And balancing off a question of enforceability in terms of controlling which type of guest was going to a specific residence hall room. For example, we have not really gotten into and I don't have a particular feeling for the rights of third—the third, rights of the corporation or rights of the commercial activity. My concern is primarily with the first two.

THE COURT: You said the rights balancing off our integrity. What did you mean by that?

THE WITNESS: We do have a concern (389) about commercialism on campus and we don't like to see a significant commercial presence. Our goal is to provide an educational atmosphere and I think we do that very well.

On the other hand, we were trying to develop a policy that protected that interest while at the same time allowing students to have specifically invited guests come in and talk to them about a wide range of things as long as it didn't disrupt the atmosphere in the hall itself.

THE COURT: You started out your testimony here a few moments ago, and as my notes show you said that you had some concerns that you shared with SUNY. I assume you meant New York.

THE WITNESS: I'm sorry.

THE COURT: That you shared with SUNY, State University of New York, their concerns, but you had to balance that off with an enforceable policy and with the student's rights.

THE WITNESS: Correct.

THE COURT: Is that right?

THE WITNESS: Yes, sir.

THE COURT: Now, when you say you share with SUNY or the State University of New York their concerns what are you talking about?

(390) THE WITNESS: I read some of the issues in this case pertaining to their concerns about commercialism on campus. And I share that concern. And so this policy we developed was specifically supposed to address that concern while at the same time recognizing the student's rights and the enforceability of a policy.

THE COURT: Do you believe the concerns of the State University of New York as you have read about them are legitimate ones, valid?

THE WITNESS: I agree with the concerns, yes, sir.

THE COURT: But you say that agreeing with those concerns that you balanced out, taking into consideration the enforceability of them?

THE WITNESS: We developed a policy that we felt addressed those concerns that was enforceable.

THE COURT: And also the student's rights?

THE WITNESS: Cognizant of student rights, yes, sir.

THE COURT: Thank you.

BY MR. REATH:

Q. And would you state to his Honor what your experience (391) has been with that change in regulation since it was changed?

A. Talking about the experiences is a little hard, because one of the things that happened in an exchange with Mr. Satell a year or so later was he called me up to find out how things were going under the policy.

Q. And at that point I didn't really know because since the policy had been changed I had not heard another word from anybody, students, faculty or people in the residence halls. After he called I did some checking and the reality was that the policy change had gone in with no problem, there has been no particular problem with enforceability and not too many people taking advantage of the policy that we know of.

Q. Now, in that regard are you aware of any other national organization that has the same kind of program that Mr. Satell and AFS have?

A. Yeah, I'm not aware of any, no, sir.

Q. And you haven't seen any that have applied on your campus, to your knowledge?

A. No, but we don't have—they don't need to apply under our current policy. But I'm not aware of any other organization that does this type of solicitation. I'm totally unaware how many times AFS has been on our campus since this policy was enacted.

(392) Q. And in that regard have you experienced any difficulty since the adoption of the policy with intrusion on student life in residence halls?

A. No. With any other policy, if there is a problem with the policy and its enforcement we would know about it, I would know about it.

Q. And, similarly, have you experienced any difficulty with commercialism disturbing the educational atmosphere on the campus?

A. I guess the same answer, if there was a significant problem that was being caused by the policy I would be aware of it.

Q. Now, you have read, at my request, have you not, the depositions of Mr. Hosteter and also Mr. Franco?

A. Yes, sir.

Q. And to save a little bit of time, by now you understand precisely what the SUNY regulation is and the way in which it is applied and enforced from what was read—

A. I am not sure precisely, but, yes, I think I have a general knowledge. Yes, sir.

Q. Have you an opinion based upon your experience as to the need for a need or reasonableness of a total ban to preserve or maintain the educational atmosphere?

A. I guess I can only testify as to my own experience, (393) which has been that the change in our policy has not created significant problems on our campus.

Q. Okay. Second question, is there in your opinion validity to the "floodgate" argument, i.e. the danger of disturbing the educational atmosphere in residence halls if an absolute ban on commercialism were relaxed to permit students to invite commercial invitees to their room?

MR. DOOLITTLE: Objection, your Honor. He hasn't qualified the witness.

THE COURT: Yes. Do you have an opinion on the same?

THE WITNESS: Again, my response would be the same based upon the experience we see. We see no floodgate affect.

THE COURT: That is at the University of Illinois, that is your experience?

THE WITNESS: Yes, sir.

COURT: All right.

* * *

Cross Examination of Howard Diamond.

Q. What is the location of that campus geographically?

A. We are located in Champaign-Urbana Illinois, approximately (396) 130 miles almost directly south of Chicago.

Q. Is that a large city, small city?

A. We consider it a large city. No, it's got approximate population of approximately 100,000 plus the student body. The three metropolitian areas we related to most closely are Chicago, St. Louis and Indianapolis.

Q. You were an undergraduate there, too, same school?

A. Right.

Q. So all of your experience is at that particular institution?

A. Yes, sir.

Q. And in 1979 was when you first heard of American Future Systems?

A. Yes.

Q. And your policy at that time prohibited all commercial activity in residence halls?

A. That was the wording of the policy, yes, sir.

THE COURT: Was that a written policy or just—

THE WITNESS: It was a written policy.

BY MR. DOOLITTLE:

Q. What was the period of time between the contact by Mr. Satell and the enactment or promulgation of the regulation set forth in Plaintiffs' Exhibit 47?

A. Some months. I would say probably two to three (397) months.

Q. Who was involved on the campus in the discussions?

A. I was the one who was specifically responsible for it. Obviously I also talked to the vice chancellor for student affairs, directors of housing, a number of people on the housing staff and a group of students who formed a student advisory committee to housing, what we call SHAC, student housing advisory committee. And also campus legal counsel.

Q. I'm sorry. Who?

A. Campus legal counsel was also consulted. Would you characterize the decision that you made here as an educational decision?

A. I'm sorry.

Q. Would you characterize the decision that you made here as an educational decision?

A. I guess I characterize most of the decisions that we make as having some educational component. That is the business we are in.

Q. So this policy that you have there, your institution, is its best educational judgment about what it should do on its campus?

A. Yes, sir.

Q. What were the things that you took into consideration when you were considering this change?

(398) A. We took into consideration the potential disruption to the other residence in the area, We took into consideration security problems, which is something we are obviously always very conscious of in the hall. We took into consideration the educational process of the kind of things we like to see going on in the hall. We took into consideration, as I suggested before, the enforceability of a regulation, the role that we had in terms of t1:e types of guests and who the guests were and what the purposes were.

Q. What were your security concerns?

A. Security concerns are we don't want people wandering around in the halls unescorted.

Q. You require that off-campus people be escorted?

A. We require that anybody who is not living in the residence halls be escorted by faculty, staff or student.

Q. All residence halls?

A. Yes, sir.

Q. Do you have any other security concerns?

Q. I think that probably encompasses most of them.

Q. Well, do you feel you have a responsibility as the owner of the residence halls to maintain that type of security?

A. Yes, sir.

* * *

(433) MR. DOOLITTLE: First I would like to point out that the testimony of the representatives of AFS here both agreed, Miss Rapp and Mr. Weinberg, both agreed that the actual presentation did not change when it was conducted in the location other than the University dormitory. This is not a regulation of speech, your Honor. It is merely a regulation of a place where it may occur.

* * *

Direct Examination of William J. Murabito.

(439) Q. A point of clarification, your reference to 60,000 students?

A. Yes.

Q. Is that in dormitories or is that the total studentbody of the State University?

A. No, we have approximately 180,000 students within the State University, and approximately 1/3 or 60,000 are housed in our residence halls.

THE COURT: That would include both four year and two year institutions?

THE WITNESS: Yes. We have 25 institutions. Six of them are Ag and tech, which would be two years. And the rest are either upper-division four year schools or graduate schools. It (440) does not include the community colleges. We have 30 community colleges, and only two of them have residence halls. But they are not part of our residence hall program because they have special boards.

* * *

(453) Q. Why?

A. The purpose behind this as relates to the residence hall is, as I mentioned earlier, we have the charge of establishing a residence hall that is supportive of the educational mission of the institution. We have some cases a thousand students or cases 7000 students living on campus. We bring students from a variety of background on the campus. It is our obligation to create an environment that is conducive for these students to study, to sleep. We create rules and regulations in support of creating an environment in support of the educational mission, rules and regulations controlling visitation rights, controlling a whole variety of aspects of quiet hours—

MR. REATH: I'm sorry?

THE COURT: Quiet hours.

A. Quiet hours. Also, we have a duty to provide a safe and secure environment for these students. Parents call, they are very concerned every time they read (454) something in the newspaper that there has been intrusion, there has been a rape, there has been a robbery, no matter if it is a university residence hall in state, out of state, whatever, they become concerned. They call us. They view us as having a duty to provide a safe and secure environment. And the students feel the same way. They look to us to prevent outsiders from coming into the residence halls.

We also have a duty to the students and the parents to prevent, as we view it, exploitation of the students, commercial exploitation. If we get calls from parents that certain activities happen on a college campus or their son or daughter, this happened to them, they look to us to correct it or want a reason why we allowed this to happen. Additionally, as a tax supported institution, state university is supported through tax dollars, we are viewed as having responsibility to not give special treatment to commercial enterprises. I know that around the college campus we have stores and people providing services that pay tax dollars. And they resent an attempt of a non-taxpaying enterprise, real estate, what have you, coming in and trying to present or present a service or product to the students and not supporting through their own tax dollars. (455) Basically that is the rationale. And we really need these things in order to maintain some resemblance of order within the residence hall.

MR. REATH: I'm sorry. I didn't—

MR. REATH: I'm sorry. I didn't—

THE WITNESS: We need these things in order to maintain some resemblance of order in the residence hall.

BY MR. DOOLITTLE:

Q. How does the ban on commercial enterprises operating in residence halls impact or not on safety considerations?

A. Well, first of all when individuals come into the residence hall there is the need to know who is coming into your residence hall, is it a visitor, is it a friend of a student, is it somebody who is just walking in selling a product. We try to prevent intrusion into

our residence halls from individuals who are there for reasons other than supporting educational mission or friends of the students or roommates, what have you. With allowing vendors to come in, first of all, we want our residence staff, both professional and students, to provide a service to the students, counseling, we have numerous roommate problems. There are a whole variety of issues that they must be concerned with. To take them away from screening (456) visitors, every merchant that would come in would be impossible with our current staff. What we would have to do is create more positions. And under our new dormitory income fund plan that cost would have to be borne by the students living in the residence hall. The same students who have said that any increases in the cost of residence halls would prohibit them from attending college.

THE COURT: Are you aware of that the issue is here with this particular plaintiff and the issue before the Court, whether or not invited commercial vendors should be allowed to come in?

THE WITNESS: Yes.

THE COURT: That wouldn't be the same as you mentioned, and I can understand it readily, trying to prevent solicitation of students.

THE WITNESS: We would need to, in my view, in order to maintain the things I mentioned an invited guest or uninvited guest, treat them in the same way in terms of the reason why they were there, control, if you take an uninvited guest in an isolated situation it may not be disturbing. But if you project that over and over again it becomes very intrusive into the education –

THE COURT: We are talking about (457) invited guests.

THE WITNESS: Invited guests, yes. I can forsee invited guests, in terms of conducting commercial activity, arranging for invitations into the dormitory that every hall would have at least some activity every night. And I think that would be intrusive.

THE COURT: Why?

THE WITNESS: Because, one, the same students are going to be asked to come to one party by the individual or going to be asked to come to another party the following night, another party the following night. When you look at the actual presentation that is just one part of the process. What becomes intrusive is the

pressure on students to come, the knocking on doors ahead of time by the host. I'm not saying the individual who is providing the commercial activity, but the individual who is arranging for the party. It becomes intrusive into the process.

THE COURT: What do you base your suspicions along that regard on? Do you have any experience to draw on?

THE WITNESS: In terms of invited guests?

(458) THE COURT: Well, you say that if invited commercial guests were allowed it would be intrusive. But the students would be bothered by fellow students trying to arrange for different groups, etc., and it would be confusing and in essence that is what you are saying. But how do you know that? Do you have any experience in that regard?

THE WITNESS: I have visited every campus as part of my responsibilities and I go through the dormitories and I ask students their concerns, especially relating to the dormitory income fund, the things that they are concerned with. And in walking through, and you talk to people, one of their concerns is that they want a quiet atmosphere, they want to be able to study, don't want to go outside the residence hall if they have to study. It has been my experience that anything added to what we have now, and we talked—I heard some testimony talking about parties and social gatherings, whatever. And these things do happen. And when they become loud and noisy we try to control for those. Anything added to that I think really would be too much.

THE COURT: Has the State University of New York examined the policies and practices of other state universities in that regard and drawn on (459) that experience?

THE WITNESS: We have looked at other universities. We have like peer institutions throughout the country. And we do talk to other institutions about their dormitory rules and regulations. And I think nationwide the exclusion of commercial activities in a residence hall is probably the standard.

THE COURT: We have heard to the contrary in this trial insofar as invited commercial activity that the State University of New York is the only state university that prohibits invited commercial guests.

THE WITNESS: I doubt that very much. I doubt that very much.

* * *

Cross Examination of William J. Murabito.

Q. And therefore all I'm trying to get you to conceced, if you will, is that there are for some students non-commercial, educational advantages that they can get from watching an AFS demonstration, from participating in an AFS demonstration?

MR. DOOLITTLE: I think I object to the question.

THE COURT: No, overruled. Do you agree with that statement or not?

A. For some students.

Q. Okay, for some. Now, let's go back, if we can, and I am going to ask my associate, Mr. Mack, if he will assist me. Because I want to get down on paper so we can all see it from you and from other witnesses, I want to see if we can identify specifically what are the articulated reasons or the so-called (485) university purpose in adopting the so-called—this total ban, okay? Now, before I do that I want to be sure that we understand what we are talking about. And that do you agree, as was testified to by Dr. Hosteter, that the ban of "commercial services" precludes any student from inviting any third party invitee into the room if the purpose of the meeting is to secure information or services, professional or otherwise, if the person, the third person invitee is being paid money or seeks to make a profit out of his or her participation?

A. Yes, I believe that's what the policy is.

Q. That's what the policy is. And so we are in agreement that that policy does prevent a group of students from inviting a lawyer who for a fee would come and tell them about what it means to go to law school, what it means—what the legal profession is all about, what one should know about the law, what one's legal rights, that kind of thing, if that person is invited in and they are being paid a fee for that it is precluded under your regulation?

A. It is precluded as a commercial activity.

Q. Right.

A. If that person was contracted to provide that service as maybe they are going to present it to the residence (486) hall just as they would any type of program use of facility policy, that would be allowed. But by review.

Q. Right. And similarly if there was a student who had been given a small inheritance by an aunt or some family relative and that student wanted to consult with a lawyer as to his or her legal rights and wanted to use his or her dorm room as the place for the meeting under your regulation that would be prohibited, would it not.

A. That would be prohibited.

Q. Okay. And similarly one would be prohibited from using the room for tutoring, a private tutoring for a fee?

A. That would be prohibited.

Q. Similarly if a student wanted to sell at the end of a course or the end of a term his or her books or his or her computer or his or her bicycle because they had no further need for it one couldn't use the dormitory room for that purpose either, could they?

A. They would have to use the other services available on campus to do those things. Just as the books, yes, it would be prohibited from their use of their room.

Q. Right. And without having to go through the whole litany of the list that we covered with Dr. Hosteter, all of the ones that Dr. Hosteter were asked about as (487) being prohibited of the same general vein would—

A. Yes.

Q. —you agree would be prohibited by your regulation?

A. The ones that you just mentioned I think were the

Q. Some of them.

A. Some of them. I think they are pretty well representative of the type of commercial activity that would not be allowed.

Q. And I believe another one that we had, we asked about was if a group of young women students decided that they wanted to bring in an outside medical doctor to meet with them and talk to them about the issues of women's health, fertility, abortion, birth-control and such subjects and they all were to chip in to pay for

the time and services of that third party invitee they would not be permitted to do that under the application of the University's rule, isn't that correct?

A. That's correct.

Q. So that as paragraph 9 of the agreement has been—that has been agreed to and stipulated in this case provides and says students on SUNY campuses are prohibited from inviting into their dormitory rooms commercial enterprises which furnish information, provide a product or a service with the end result is (488) the intent to make a profit by the invitee?

A. That's correct.

Q. That's correct. And in point of fact, as we just established, the application of the rule goes beyond "a commercial enterprise" when we are dealing, for example, with professional people who are offering services or information as opposed to the sale of a product?

A. The product they are selling are their services. And in this regard they are providing information it would be viewed as a commercial enterprise.

Q. I see. And you take no effort to make any kind of a definition of what constitutes a commercial enterprise?

A. An enterprise that is there to make a profit.

Q. Now, what about can we agree that your role is intended to reach and does the student who wants to take his or her dorm room and turn it into a temporary or part-time lunch counter?

A. Yes, that would be prohibited.

Q. That would clearly constitute, in your view, the operation of a commercial enterprise, would it not?

A. That would, yes, that would.

Q. Because they are trying to perform some kind of a business on the university property?

(489) A. They are attempting to use the state support facility to make a profit.

Q. Right. Now, what about the student who on one occasion, once in her lifetime of the four years at college, decides that she wants to invite her sister to come to her room to meet with some of her friends to give her sister an opportunity to exhibit some sweaters that she—

THE COURT: Wasn't this in Dr. Hosteter's testimoy?

MR. REATH: Yes, sir, it was.

THE COURT: Haven't you already asked him whether he agrees with Hosteter?

MR. REATH: Yes, I have.

THE COURT: And he said yes.

MR. REATH: Yes.

THE COURT: And you are going to have Hosteter here too, aren't we?

MR. REATH: I don't believe so.

THE COURT: All right. Well, let's not—he has already said he agrees.

MR. REATH: I understand.

BY MR. REATH:

Q. The individual person who wants to bring somebody in in those circumstances is prevented from doing so, are (490) they not?

A. That's correct.

Q. And what is the university's justification or interest in preventing that kind of activity, the one I just identified?

A. Well, one, we have an interest of the individual's roommate. We have the interest of the other students in the hall of maybe they are selling faulty sweaters. They are going to shrink. We have no reason—we have no way to determine that. We have an individual using a tax supported facility and using that to make a profit. Depending on how they generate people to come to the room, if they went to the rooms themselves to sell their product that would be intrusive in terms of students who maybe are in their rooms trying to study, sleep, or what have you, because they will probably put billboards up or knock on the doors or whatever. That would be intrusive.

Q. And so it would be your view that the hypothetical I just gave about the woman selling sweaters, that one act would constitute the conduct of a commercial enterprise on state property?

A. I would view that as that and we would prohibit that.

Q. All right. Now, I would like to see if we can find out exactly what are the articulated state interests. (491) And I'm going to go back to my notes, if I may, and I will try to set them down to see if we can get some agreement so we can see them all laid out. I think the first that you said was that the residence all is supportive of the educational mission, was that correct?

A. That's correct.

Q. And would it be fair to say, to characterize that in the way that Dr. Hosteter did, that that would be to preserve the educational atmosphere and setting of a residence hall?

A. That's correct.

Q. And would you agree with him that that was the primary objective of this total ban?

A. No, I wouldn't agree that that was the primary. I think you have to take all of them into consideration and depending on the circumstances look at the specific activity.

Q. All right. Now, the second one was to create an environment for study and sleep, according to my notes; is what you gave, is that correct?

A. That's correct.

Q. The third that I have on my notes were that rules and regulations to support and control conduct in the dorm room and to preserve quiet hours.

(492) A. No, I don't think they are all geared to the quiet hours. Quiet hours are an example of a rule, regulation that is put in place to preserve the educational atmosphere.

Q. I see. So that that would really be part of—

A. One example.

Q. Part of number one, which is preserving the educational atmosphere?

A. That's correct.

Q. Now, another one that I have down I think would be provide a safe and secure environment?

A. That's correct.

Q. And the reason for that would—the objective there is, as you said, to prevent outsiders from coming in to the residence?

A. The safe and secure environment. We try to prevent outsiders, but that is only one measure that we take. I mean, there are insiders that in terms of theft and whatever that we have to work with the students. But in terms of the intrusion from outsiders, yes.

Q. And then the next one that you gave was the exploitation of students?

A. Yes.

Q. And I assume from that that you mean the potential for exploitation by unethical or dishonest entrepreneurs (493) and sales people?

A. Yes.

Q. And then another one that I think you gave us was related to the tax supported concept of government property and that you were not supposed to give special treatment to commercial people who come on campus, is that right?

A. The facilities of a tax supported institution should not give any special benefits to commercial enterprises, that is correct.

Q. And I think that you indicated that one of the motivations there was the fact that you had gotten objections from commercial people in the area serving the campus?

A. We have on a number of occasions have had objections. Right. And that because of that you have to have some consideration for their concern that they are paying taxes and rent for their store properties?

A. That's correct.

Q. And that it would be unfair to make university facilities available without an additional cost to such merchant, is that right?

A. That's correct.

Q. Then I think the last one that I have is that you must maintain some resemblance of order?

(494) A. Well, that stems from one and two, I think it was an extension of that in terms of maintaining an educational environment, atmosphere.

Q. Now, his Honor asked you what studies, if any—

MR. SILVER: Excuse me. It is very difficult to hear.

THE COURT: Yes, speak up a little louder, counsel.

MR. REATH: All right. I will try, sir.

Q. I believe his Honor asked you what efforts you had made to contact other universities regarding their experience, correct?

A. Yes.

Q. Are you familiar with the very extensive list of state universities located along the eastern and southern portions of this country and going out into the midwest and even into the far west that were testified to by Miss Rapp, Miss Kalthoff and Miss Byrd and as to places where AFS had no difficulty whatsoever and is permitted to come into the dorm rooms of students and make their presentations?

MR. DOOLITTLE: I object to that question and characterization of the previous witnesses' testimony referred to there.

(495) THE COURT: Well, it is a little tainted in its verbage, but are you aware that there are and were testified to numerous other universities and colleges in the south and the west and in the east where the AFS demonstrations are permitted?

MR. DOOLITTLE: With all due respect, your Honor, I object. I know I shouldn't object to your own question.

THE COURT: That is what I heard.

MR. DOOLITTLE: The characterization of numerous. There are a few.

THE COURT: How many is numerous to you? To me over ten is numerous.

MR. DOOLITTLE: With respect to the colleges and universities I would think we need hundreds.

THE COURT: All right. You may not be aware of it, I am just ask[illegible]

THE WITNESS: Did I hear that testimony? I heard maybe a dozen. I would have to say, if I may—

THE COURT: Yes, go ahead.

THE WITNESS: That there are approximately 2,000 colleges throughout the country. And I wouldn't say that that group is representative in (496) terms of the total.

BY MR. REATH:

Q. My question is did you make any effort to contact any of the universities where this kind of activity is permitted to find out what their experience has been, what problems they have encountered and what their experience has been in permitting this kind of activity? I think you can answer that yes or no and then we will go on from there. Either you did or you didn't.

A. Not an organized research, no.

Q. And in particular has it been related to you by your counsel about the testimony of Mr. Howard Diamond who, at the University of Illinois, had almost the identical position that you have at Central SUNY?

A. I did hear his testimony. I wouldn't say that it was identical. That is at one campus.

A. Okay.

A. And we have many campuses.

Q. Fine. But you know he has held a responsible position at—

A. Yes.

Q. —at a highly respected, large state university in the midwest of our country?

A. Having graduated from there I should not understate (497) that, yes.

THE COURT: Were you here for his testimony?

THE WITNESS: Yes, I was.

THE COURT: You are an Illinois graduate, yourself?

THE WITNESS: Yes.

THE COURT: At Urbana-Champaign?

THE WITNESS: Urbana-Champaign, yes.

BY MR. REATH:

Q. I show you a document marked for identification as Plaintiffs' Exhibit 47. You were in Court, were you not, when that regulation was read into the record?

A. Yes.

Q. I want to show you next an exhibit marked for identification as Plaintiffs' Exhibit 48, I have previously given all these to counsel, which is a list of letters from—

THE COURT: If you are saying any of this for the record he can't hear it.

Q. I want to identify for the record Plaintiffs' Exhibit 48 which are a series of letters from the University of Delaware, Newark, Delaware; the University of California, Davis; the University of Minnesota, solicitation policy; and the University of Texas. And (498) I want to ask you to look at those and tell me whether you are familiar with any of those regulations from other state institutions where the kind of activity that is banned at SUNY is permitted?

MR. DOOLITTLE: Objection to the characterization of the last part as to what those policies say.

THE COURT: Sustained.

Q. Just are you familiar with any of those, the policies of any of those other institutions? I am familiar with the institution. Are you familiar with what their rules or solicitation or how they interpret and apply them to—for example, an AFS demonstration?

A. Not these four institutions.

Q. No. Okay. Would you be surprised if I told you that all four of them permit the kind of invited demonstration in a student's room which is banned under your regulation?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

MR. DOOLITTLE: That is not in evidence.

MR. REATH: No.

MR. DOOLITTLE: There has been no (499) offer—

MR. REATH: I haven't offered it in evidence yet. I am laying some foundation. I want to ask the witness some questions about it.

THE COURT: He can mark it. He can mark anything. He can mark the tire on his car outside if he wants to. But I am not going to admit it unless it is relevant.

BY MR. REATH:

Q. Back to the AFS demonstration. Would you agree with me that this is a perfectly lawful activity?

A. What I saw, I didn't see anything I would regard as unlawful.

Q. Well then can't you agree with me directly and say, agree it was lawful?

A. I can't speak to part of the demonstration that wasn't presented. What I saw was lawful.

Q. Okay. Good. And, by the way, for those students who may have gone with a desire to purchase products would you be willing to credit the sincerity of their desire to get those kinds of products?

A. I have no reason not to.

* * *

(503) Q. Did you or to your knowledge anyone in your department initiate at any time since this lawsuit began any formal discussions with student leadership within the SUNY system either at Cortland, SUNY or anywhere else regarding possible ways to accomodate the free speech contentions that were advanced either by the students or by AFS?

MR. DOOLITTLE: Object to the question, your Honor. The first part I don't think the witness can answer it. I also object to the characterization.

THE COURT: He said whether he or anyone within his knowledge. That part is not sustained. Now, what other part?

MR. DOOLITTLE: His characterization of what the claims are.

THE COURT: No, overruled. He may answer the question.

(504) BY MR. REATH:

Q. Did you understand the question? Want to have it read back?

A. No, I understand the question. No, I have not and to my knowledge no one has consulted with the students regarding this.

Q. Did you or to your knowledge any one in SUNY Central in the area of student activities, residential life, ever consider experimenting at one or more campus with a modification of the existing rule that makes a total ban that would distinguish, one, between invited and uninvited speech and, secondly, a regulation that would specifically prohibit students from using their rooms on a regular continuing basis for commercial purposes?

A. Well, I have discussed this at times with the resident directors and there was no interest for change because their feeling was that—

MR. REATH: Well, I object to any statement as to the feelings of others.

THE COURT: Sustained. But you discussed it with them and no change was made, is that right?

THE WITNESS: That's correct.

THE COURT: When you say with the (505) resident directors—

THE WITNESS: Resident directors of residence life, individuals on the campus who would be responsible for the resident life program.

BY MR. REATH:

Q. And answer specifically to my question, you never did consider an experimentation that would, for instance, adopt a rule similar to the University of Illinois?

A. There was no need to. Our policy was working.

Q. Well, the answer to my question is you did not?

A. That's correct.

* * *

Redirect Examination of William J. Murabito.

(507) Q. Do the State University of New York dormitories have a policy which requires registration in the escorting of guests such as that described by Mr. Diamond?

A. No, we have 25 campuses and they look at local circumstances and conditions and establish the rules and regulations relating to whatever they need to manage their dormitories, residence halls.

Q. In your position if the State University of New York felt it necessary to change the type of dormitory access that the University of Illinois uses as described by Mr. Diamond, would that, in your opinion, have any impact on those dormitories?

A. Well, if we established a Universide wide policy that required each campus to lock up as they do at the University of Illinois and to require signin and (508) escorting I think that would change the student flow unnecessarily. It would require extensive rekeying, coding, investment on the part of the university and an ongoing expense of more personnel to enforce that, all of which would be borne by the students in the residence hall. It would not be state supported.

Q. Do you think that if the university is required to allow invited, in quotes, commercial people to the campus to go into the dormitories that we would have to go to such a system?

A. I don't see how we could not do that. I think we would have to.

Q. And why is that?

A. Because we would have to determine who is in a residence hall, who has really been invited, who has been solicited to be invited, who is there. And I think in terms of number four we would certainly want to have some idea in terms of commercial exploitation and that would vary from individual to individual. I see a real change in how we handle the management of the residence halls.

Q. If it came to the attention of the administration that a student was in his room and had sold his books to a fellow student or to someone else or sold his bicycle what would happen?

(509) Well, though technically that would be a violation I think, as a matter of fact I know, the judgment of the administrator would be to ignore that. Because that individual is not really there for a profit. They are selling their books probably to buy books for their next class and that routinely happens. And if an individual became an agent for, say, a book company or all of a sudden had six bicycles and they were selling a bicycle every day, I think if that was brought to our attention then we would intercede and invoke the policy. But if it is a casual sale that the person needs to see that to buy other textbooks, or for whatever reason, we would not intercede.

* * *

Recross Examination of William J. Murabito.

(511) A. Yes, I can. Because by our new policy all costs for operating the residence halls have to be offset by revenue generated in the residence hall.

* * *

Direct Examination of James P. Doellenfeld.

(551) THE COURT: I think I asked him earlier to define it and maybe you didn't hear him. Tell us again what the academic podium is.

THE WITNESS: The academic podium is a core, rectangular shaped core of approximately twelve buildings in which classes are held, administrative units have office space and faculty have offices.

MR. REATH: I see.

THE WITNESS: As opposed to, if I could describe for a minute briefly the layout of this campus, it is a rectangle in the middle, academic podium. There are four—

* * *

(561) Q. What did you personally observe?

A. The vending that occurred on the podium was largely a situation where any good or service that was purchased was done at risk by the purchaser as one could not track who the vendor was. If you purchased a ring that you thought was sterling and it turned your finger green in three days and the purchaser came to the university inquiring as to who the vendor was from whom they had purchased the ring we couldn't tell them. We simply didn't keep those records. It was uncontrolled, (562) completely uncontrolled. Let me amend that. Largely uncontrolled.

Q. Other than jewelry are you aware of anything else that was being sold there?

THE COURT: Hot dogs. Let's move on.

* * *

BY MR. DOOLITTLE:

(563) Q. This is Plaintiffs' 25, a publication called Viewpoint 85-86. Are you familiar with that publication at all?

A. Yes, I am.

* * *

Q. There was some testimony yesterday—or, I'm sorry, some testimony in this case concerning the university's involvement with the document in orientation programs or the like. Are you familiar with that document and the university's involvement with it at all?

A. Yes, I am.

Q. Could you tell me first of all what the university involvement with that publication is?

A. Plaintiffs' Exhibit 25, Viewpoint 85-86, is a publication (564) of the undergraduate student government. And it is updated annually and briefly is a students' prospective of the University at Albany.

Q. Is it within your knowledge as to whether this is distributed by the University administration?

A. This document is distributed primarily to incoming students at the orientation, at the summer orientation programs. Orientation is a university program. This particular document I understand is—

MR. REATH: Objected to then, move to strike.

THE COURT: Pardon me?

MR. REATH: I move to strike. He says he understands. I think he has to testify to actual knowledge, not belief and understanding.

THE COURT: It depends on how he is using the word "understand". Go ahead, finish your answer. And then you can move to strike.

A. To the best of my knowledge this document is distributed during the student governments presentations during orientation. It is not distributed per se by the university administrators.

* * *

Direct Examination of Frank G. Pogue, Jr.

(577) Q. Why outside the quad?

A. Well, we place a great deal of emphasis on safety and the need to maintain order within residence. Now, first of all we try to monitor the flow of individuals who move in and out of residence because we have an obligation to protect students. So we try to guarantee as much as possible the safety of them and one way to do that is to try to reduce the number of strangers who are in and out of the residence hall.

Q. Now, you are aware of the trustees' policy that has been challenged in this case which prohibits commercial enterprises from operating on university campuses?

A. Yes.

Q. From your standpoint and from your position in operating the residence halls on your campus do you believe that that type of a policy is necessary?

A. I do think that the policy is necessary. And I think so primarily, one, I have discussed the concerns of safety and the need to minimize the presence of strangers in residence. But, in addition, the area of student affairs, the area that I am responsible for—let me say first of all the State University system, but especially the University at Albany, that is not unusual, has not realized in the last eleven years any significant growth in terms of

lines or professional (578) staff persons coming to the University from state sources. In other words, our staff in residence or anywhere else in student affairs has not increased over the last eleven years. Now, so we have to be especially concerned about those responsibilities already assigned to the residential life staff.

Now, adding or permitting commercial activities within residence would mean that we would need to reassign many of the responsibilities that are normally associated with residential staff, which is educational in nature, to monitor the activities of traffic of persons who would be strangers within the facility in order to guarantee certain amount of safety. So I would certainly think that that kind of policy should remain in place. I support that as a policy.

Q. Do you have any knowledge insofar as the Albany campus is concerned about students' study habits?

A. Well, yes, of course. I regard a student's room as a place where a significant amount of studying is suppose to take place within the individual's room. And we equip that room for that purpose, desk or study lamp, and so forth. Significant amount of time would be devoted to study.

(579) Q. Do you have an opinion as to what effect there would be, if any, if commercial activities were permitted in the dormitories?

A. Well, of course, the permission of commercial activity in residence we argued would disrupt that—the quiet hours as well as the study hours and the possibility of disrupting the normal—the conduct of the relationship between roommates and, of course, persons who reside in the suite.

Q. If the university were to be obliged to permit commercial enterprises in its dormitories do you believe you would have to make any changes at the University at Albany?

A. Well, of course. I would certainly think first of all that we have talked about the need to probably increase staff. But also to reassign staff from existing responsibilities to other areas of responsibilities that they are not currently responsible for. We would have to monitor in a systematic way the flow of traffic in residence. We would have to have additional staff in order to

place an individual at least at the entrance of every quad to make sure that we are able to monitor that traffic.

Q. Do you have any contact with the parents of students yourself?

(580) A. Yes, I have a great deal of contact with parents.

Q. What does that contact involve?

A. Well, normally if anything goes wrong in the life of a student my office hears from a parent or both parents. And sometimes grandparents. So in terms of—this is always a concern of parents, is that of safety for their children. And the presence of strangers in residence would certainly be a concern of parents.

Q. Do you have an impression of how parents see the responsibilities of the university administration?

MR. REATH: Objection.

MR. DOOLITTLE: Pardon me?

THE COURT: Would you read the question back, please, Mr. Mayo.

(THE COURT REPORTER READ BACK THE LAST QUESTION.)

THE COURT: Sustained as to form. Have you had expressed to you by parents in the course of your official duties their concern in this regard?

THE WITNESS: Oh, absolutely.

THE COURT: You may follow up on that.

BY MR. DOOLITTLE:

Q. Give us an example of what they expressed.

A. Well, parents are unlike their children, are only concerned about roommates and the selection of roommates. (581) This is especially true when freshmen, first year students are coming to the university for the first time and many are coming, not having lived near persons of different racial background other than their own, socioeconomic positions than their own. Many of them have different values and have not lived around those different values. And nor have their parents. And many cases they raise questions

about the assignment of son or daughter in a room with individuals, although the same color perhaps appear to have different values. And, of course, also for persons who are a different color. So parents raise this as a concern often.

Now, parents are also concerned about safety. We have a special introduction for parents over the summer. Not only are students expected to go to student orientation for three days and all incoming students do, we do the same thing with their parents because we are convincing them also that the university is safe from the standpoint of firearms, from the standpoint of our university security and special programs that are designed to make sure that the campus is safe and secure. That is our don't walk alone program, which is a student escort service, a university marshal. I mean, those are

(582) things that are explained to parents in order to ease much of the tension that is often expressed.

Q. You heard Mr. Dollefeld testify concerning the podium policy?

A. Yeah.

Q. Are you familiar with that policy yourself?

A. Yes.

Q. Are you familiar with any of the reasons why the university decided to make changes in that policy?

A. Yes.

Q. Could you tell us, tell the Court what those are, those reasons are?

A. Well, the university was very concerned about the shoddiness of what was called the academic podium area, only the area which is right outside of the campus center where I think Mr. Dollenfeld referred to as the student union. That is an area where hundreds of visitors pass everyday, not to mention the thousands of students who pass that area every day. And so we were concerned about how that area appeared. That is one thing. And we wanted to clean it up a little. So we wanted to reduce the amount of activity but at the same time keep certain privileges going. We were also concerned about the kind of free for all access and often the case that persons who had (583) businesses set up in front of the student union were themselves competing

with local merchants. And we got some complaints from the local merchants about that kind of activity and we wanted to reduce that. But we were also concerned about the availability for our own and the students to make a profit, so to speak, if a profit is to be made that we felt strongly that our students and student organizations themselves; should benefit directly from that kind of activity.

Q. Was the activity at that time confined exclusively to students?

A. No, not exclusively to students. Before, you mean, before the current policy?

Q. Yes.

A. No. An individual, for example, could agree to have merchandise sold as long as a student was present on the scene. That was the policy just before the one we have in place now. The benefit of commercial activity must go directly to students, the student organizations.

Q. How would that have worked, the other one?

A. Well, if an individual wanted to sell jeans, which we had a number of persons selling, that individual would have to be sponsored by an organization, a recognized student organization. Now, as long as an individual (584) who was a member of that organization was present on the scene it was an accepted activity. Now, that is the way that happened. The individuals sell jeans or individuals sell roses or socks or any other kind of activity. Now, so that the individual organization could—would receive a commission from that particular person. But as it stands now, see, the profit is expected to come directly to the student organization.

Q. Supposing the university was to be required to allow commercial invitees access to the residence hall, such as that as accomplished by American Future Systems. Do you see any impact at all on the residence halls as a result of that requirement?

A. Well, I certain do. As I indicated, the need to have increased staff or a need to monitor the flow of activity and the traffic and a need to reassign certain responsibilities of currently existing staff. But I also see that possibly if we were dealing with—we have a hugh operation, first of all. We have over 6,800 students. And it

would work a special hardship among the staff to deal notsomuch with the single organization but with the individual organizations that would inevitably line up behind that organization. So we are talking about precedent setting kind of operation. That could impact (585) upon us in a very serious way, especially in terms of, you know, as it impacts on the staff. And also the relationships between our students and the relationship between our students and the relationship between our students and the RAs, especially. Now, it is also the case that we try to emphasis education, we try to emphasize interacting with each other as a part of the educational enterprise, as a part of the education that a student is suppose to receive in a dormitory. It does not involve the act of negotiating and selling to each other goods and services. Because that in itself can create tension between students themselves. And it has in the past, especially in the campus center area where students have sold goods to each other. It has created tension and we would like to keep our focus on citizenship and responsibility as a part of the educational experience and not one in which I sell you a good or product and that sort of thing.

Q. There has been admitted in evidence in this case tapes of an AFS presentation. One of them runs about two and a half hours and the other one runs about 25 minutes. Have you had the opportunity to review either one of those tapes?

A. Yes, I did review the one that was 20 to 25 minutes.

(586) Q. Do you have an opinion as to whether or not there is any educational value in that tape?

A. Frankly I saw no educational value in the tape. I did see at least a couple of things that I would suggest that would interrupt the normal flow of activity in residence and would be counter to the educational purposes of living on the campus. One, the assembly itself in a room was disruptive. I think it was clear in our situation anyway we have two or more persons living in the same room and it appeared to me that that group was—had gathered in that room which would be—could be disruptive and would be counter to quiet hours and counter to the study arrangement that we would like to create and maintain. It was also—also seen there that—I'm not sure about and I couldn't explain it and I watched it again, but at the beginning of the presentation one

student did leave the room and the person who was responsible for the session thanked her for either coming or just thanked her, and that person left. Which could, I suppose, imply that an individual has a choice in the matter as to whether a person wants to stay. But what I saw in the film was certainly counter productive when it comes to the use of a room for the purposes we have in mind.

(587) Q. Was there anything else you saw in the tape as far as the presentation itself was concerned?

A. Well, what I saw also, the role, the role that a student had placed herself in as a seller, as a pusher of goods. And that is not the role we try to establish between our students. This person who appeared to be a student had placed herself in a different relationship with the other students in that room. And in that situation we have—we are again, we have evidence as so often the case those situations is heightened the possibility of conflict between students, primarily because they are selling a product that they cannot guarantee. We have seen that kind of thing take place in the campus center area.

Q. If somebody from off campus didn't want to present—did want to present an educational program, all right, on any subject are you aware of—would that type of an application come to your office or would that be some other office in the university?

A. Well, if the person wants to present an educational program in the residence, first of all it goes to the—would go to the residential life. And particular consideration is given to the extent to which that educational program is consistent with the expectation of the residential life staff. If it is consistent (588) with the educational programming then the person then was a special, you know, a special interest form that must be completed and perhaps a space is assigned if that is to be held in residence. And for the most part, though, that kind of request would go directly to Mr. Dollefeld in the area off campus activities and an activity would be held elsewhere, not in residence.

* * *

Cross Examination of Frank G. Pogue, Jr.

(603) Q. Now, let me ask you this: have you made any studies at all to gain any empirical data as to what could be the result if students were permitted to make their own choices in terms of inviting third party invitees to—

MR. DOOLITTLE: I can't hear you.
THE COURT: Would you read the question back, Mr. Mayo?
(THE COURT REPORTER READ BACK THE LAST QUESTION.)

Q. To use their rooms for that kind of a presentation?

A. I have not made a specific study in relationship to American Future Systems. I can only say to you, though, that on the basis of the research I am familiar with that when a relationship does change between students it can create tension and can change the nature of the living arrangement within residential life.

Q. I see. Now, are you aware of the number of institutions, state universities where they have no such flat ban as you have at the State University of New York?

A. I can assume that there are some.

Q. And have you made any effort to contact any of them, your counterparts at, for example, the University of Illinois or the University of Texas or the University (604) of Minnesota, some of these other institutions?

A. No, I have not.

Q. You have not made any effort to contact any of them?

A. I have not contacted them,

Q. So you don't know what empirical data they have as to the success or failure of their policy, which permits this kind of activity?

A. I can only, according to—as to the policy of the University of Albany. That we would consider the admission of American Future Systems and the others that would likely follow as counter to the educational experience.

Q. I see.

THE COURT: As what, Doctor?
THE WITNESS: As counter, counter to the educational experience and atmosphere that we like to maintain.

BY MR. REATH

Q. Now, I'm sorry, I lost my train of thought. Yes. You talked a lot about the fact that you would have to add additional staff because you would have to monitor all of these activities. Do you remember that testimony?

A. Yes.

Q. Now, what is the policy at the university at the present (605) time in terms of open dorms and rules that require guests be escorted to the rooms?

A. Yes, we expect students who live in a residence to inform resident directors of guests if that person is to be in residence for 24 hours.

Q. Well, that has to do with an overnight guest?

A. Well, yes.

Q. Yes. But if a resident wants to bring in a friend from another college or mother or father or friend who are there on campus for a basketball game, coming in for a couple of hours just to sit around and talk and chew the fat there is no registration requirement there, is there?

A. No, there is not.

Q. And you don't have a guard posted at the entrance of every dormitory entrance, do you?

A. It is not necessary at the moment because we do not permit commercialism. What we are suggesting is if we do then we increase the possibility of strangers entering the facility.

Q. Now, have you—

THE COURT: Let him finish. Did you finish?
THE WITNESS: Well, I was just suggesting we increase the likelihood that a larger (606) number of strangers will enter the residence and impact safety.

BY MR. REATH:

Q. All right. Now, in making that statement have you given any consideration at all to what would happen if you made a distinction between the invited guest and the uninvited third party who comes and seeks to knock on doors randomly within the facility?

A. Have I made a distinction?

Q. Have you given any consideration to making—to considering what would be the different effect between one, permitting the students to have invited guests on the one hand or on the other hand a rule that would say there is no limit to the kind of random knocking on doors that would be permitted?

THE COURT: Invited commercial guests versus policy that anybody commercial can come in.

A. Well, our concern, of course is—

THE COURT: He says have you made any study?
THE WITNESS: No, no. I have not made a study.

BY MR. REATH:

Q. And you haven't thought out whether there might be a difference if you delineated between the invited and (607) uninvited guest?

MR. DOOLITTLE: Objection.
THE COURT: Sustained. Have you thought it out?
THE WITNESS: No.
THE COURT: All right.

BY MR. REATH:

Q. Do you have any idea at all how many organizations there are that come into a student's room only at the invitation of a student and present a sales demonstration through the invitation of a student host?

A. We would hope not any.
Q. What?
A. We would hope there aren't any.
Q. No, my question have you given any thought, have you made any attempt to—
A. Study?
Q. —to analyze how many companies like that there are that are out in the market place that sell by that technique?
A. No.

MR. REATH: I have no further questions.

* * *

Direct Examination of Raymond D. Franco.

(625) Q. You are familiar with the policy that's in dispute in this lawsuit?
A. Yes.
Q. And on your campus are you the person who is responsible for implementing that policy?
A. Yes, in residence halls, yes.
Q. Do you have an opinion as to whether or not such policy is necessary?
A. Yes, I do.
Q. Would you please tell the Court what your opinion is?
A. Given my position and I guess the way I would view anything that would be different than the existing policy my very, very strong feeling is that this policy (626) is absolutely appropriate and absolutely necessary.
Q. Why is that?
A. Well, my feeling is that first of all there are so much activities which currently takes place in the residence halls, I heard testimony all day yesterday and I'm very well aware of the amount of activity which takes place in the residence halls, not all of which in my opinion is necessarily supportive of the primary institutional goals. However, we do our best and we work very hard at trying to structure an environment and trying to provide activities and to provide programs which are in fact supportive of and do

compliment and supplement the educational experience students get in the classroom. My fear would be if this policy were not in effect that our campus would become even more active. There would be many more distractions for students. There would be just a tremendous potential for us to in a sense lose control, if you will over the residence hall environment. Which I feel we have an obligation to try to control to try to develop for and with our students. I guess I look as a practitioner in the field at this case and at this policy and I try to foresee how a change in this policy could be reasonably and I guess responsibly administered on the campus level. And I (627) just see a great deal of difficulty. I don't see one commercial enterprise, I see many. I can't tell you and I will tell you the number of times that I have been asked by just Cortland area businesses if they could do anything from simply posting a handbill on every bulletin board in the residence halls to going door to door, to slide underneath the door special advertisements of sales, and so on, that might be occurring in their stores and in their bars and restaurants. If they could come up and give free coupons to students to get them to come down to their establishments. And I see each of these activities as really being unnecessary in that there are other ways that these businesses can conduct their business through the campus newspaper, through the campus radio station and other commercial radio stations, and so on. And we are very limited both in time and space, in my opinion, in terms of the types of constructive, positive activity that we can encourage students to become involved in that there would be a tremendous imposition on the institution's ability to actually promote the educational enterprise that we are supposed to be involved with. Even the simple matter for example, of not allowing people to post bills on bulletin boards, we have 80 some clubs and organizations (628) on our campus. We have many, many cultural and educational programs and activities that occur on our campus. The bulletin boards are flooded with material just related to campus activities that in my opinion are very appropriate and very much a part of the undergraduate education. There is a mass of paper as it is. My contention is that if any student might miss an opportunity to become involved with a club or to go to a play or to take part in a lecture

or discussion because that publicity was covered up by three drink specials at bars or discounts on pizza or 20 percent off a pair of shoes downtown in my opinion we have done that student a disservice by allowing those educational and in my opinion critical activities to be missed by students because of that type of advertisement. So, again, I think we have to draw the line somewhere. I guess to me that's the bottom line, that practically speaking and I guess even philosophically speaking I think we have drawn the line at an appropriate point.

THE COURT: Well, we are talking about the broad, general proscription against commercial ventures, coming on to campus.
THE WITNESS: Right.
THE COURT: What we are concerned (629) with here though in this particular case is the right of a student to invite a person or business to come into the residence halls or on the campus—
THE WITNESS: Right.
THE COURT: —for his or her purposes.
THE WITNESS: Right.
THE COURT: Couldn't the regulation be narrowed—well, back up a little bit. What would be wrong with that? Assuming that there is nothing wrong with that type of activity why couldn't that be reasonably regulated so that that thing would happen and we wouldn't have this situation which you are trying to avoid, of pizza, beer advertisements and all the local merchants flocking into the dorm?
THE WITNESS: Okay, your Honor. Can I speak to that? I know you are in charge, so I guess if you say I can speak I don't have to look at him. Again, your Honor, I guess from my point of view, and I'm on the campus, I deal every day with what goes on in those residence halls. In my opinion the whole idea of invited versus uninvited is really, and I don't want to be harsh and I don't want to seem unfair and maybe the world "scam" is not an appropriate word, but—

MR. REATH: I'm sorry. I couldn't (630) hear that.

THE WITNESS: Scam, okay? And I guess, and I will—if I can think of a better word I will use it. I have two problems with that, with the distinction. And the actual implementation of the distinction. First of all, the problem I have is if you can picture again

in our small campus, and we are relatively small campus in the scheme of SUNY, we have 2,900 students living in 14 buildings. And those 2,900 students turn over at a rather regular rate. In other words, the same 2,900 students that are there right now will not be there in January. Four hundred or so of them will be gone and another couple of hundred of them will be brand new to the campus. Next fall probably 1,900 of the 2,900 will be brand new. So in other words it is not like we got 2,900 students who we can indoctrinate, train and communicate with one time or two times and then have them understand exactly what the procedures are. So we have a difficulty in trying to communicate the myriad of policies that we do have and approaches and procedures that we do have, although we try very hard and I think to a great degree we are successful.

However, if we had a policy which says invited people are allowed then it would be, I think, (631) impossible, really, for me, for the 14 residence hall directors who work for me and for the hundred under graduate RA's who work for me, who are also turned over at about the same rate of staffing, because they graduate, they go off campus, and so on, to in any way insure the difference between an invited and uninvited guest or an uninvited commercial invitee, okay, or uninvitee, I guess. And that it would be just extremely difficult to tell. Is this person invited or not? If I may, we did establish some well, we established some regulations related to this case. Those regulations were put in place, they were not followed. We had an AFS representative on campus set the demonstration up without registering. The student either was unaware or was told that the regulations, I'm not sure why they didn't follow the regulations, the AFS person did not make any effort to contact my office to make sure that there was any regulations that should be followed. In fact, your Honor, that demonstration was set up without following the regulation, was not held because when the sales person went to the suite the girls forgot, the girls just either forgot or decided not to follow through.

MR. REATH: If your Honor please, I (632) should have objected sooner to this whole line of testimony. This is all hearsay. This witness was asked at depositions to identify any incidents.

THE COURT: Well, you can cross examine him on that. The part where he said the girls forgot is stricken.

MR. REATH: And I move to strike any of the statements that he attributes to the women, to the students and—and I think in fairness to the court —

THE COURT: He hasn't said anything about statements of students.

MR. REATH: The woman representative.

MR. DOOLITTLE: He hasn't said anything about that yet, either.

THE COURT: Overruled. I strike the part where he said the girls forgot.

MR. REATH: May I also ask your Honor that we have identified as to time and place and date so that we know—

THE COURT: You can get into that on cross examination.

THE WITNESS: After going to the suite no one being there, this representative then went door to door to try to use the time that evening to (633) try to have a sales presentation. In other words, at that point they became an uninvited, unsolicited, commercial person. And that type of situation I could foresee happening many times.

The second problem I have is that if the name of the game is you need to be invited in order to go into the residence halls and sell your goods then my feeling is that anybody could develop that type of sales strategy, that type of solicitation strategy, if you will, either by telephone, by walking across the campus and meeting students, offering them any type of an incentive from a five dollar bill to a discount off a pizza, to whatever, to be invited. In other words, I don't see that invitation or noninvitation as being a very important point. Because if I were in business and I knew the only way I could get to

that rich market of students was to become an invited commercial enterprise that's what I would do. However, I could do it, that's what I would do. And so I really see that as almost, as just a very unimportant point.

From my point of view, as the person who would thereby have to try to regulate, try to discern the difference between being invited and uninvited and trying to deal with the floodgate that (634) I would see opening once that became the mode of operation for doing business on the campus.

THE COURT: All right.

BY MR. DOOLITTLE:

Q. Do you have an opinion as to what effect, if any, that would have on your residence halls?

A. Yes.

Q. Would you tell the Court what it is, please?

A. Yes. I do feel we are able at Cortland to exercise a reasonable level of safety and security for students. We do lock our buildings, as we indicated before, at 11 o'clock every night. We have a visitation policy which I feel works well. Generally speaking visitors and guests in the residence halls are there to see a specific individual. If people come in our buildings who are not there for specific purpose, to see a specific individual either the resident assistant the RA on duty, if it is at night, the residence hall director and students themselves will tell us that there's a stranger in the building or on our floor nobody seems to know, they will do that by calling the RA, the RA on duty, public safety, whatever. Strangers are rather easily identified, believe it or not. Our visitors and our guests are generally restricted to college age students. Generally I would (635) say a preponderance of them are other students at Cortland, although they may be other visitors from other campuses, they may be brothers and sisters of college age. But people who are walking around with suitcases or walking around that are terribly older or younger are known by our residence for the most part as being at least susceptible to question by us, by them, and they do question. If in fact we were

to open up the campus to this type of activity really it would be possible in the minds of students for anybody to have a legitimate reason to be there. They were invited to sell vacuum cleaners, to sell rugs, to sell whatever, and the age of those sales people certainly can be any age, you know, from after 16 up to age 60, I suppose, or older. And at that point the ability to notice and to take action in the event that there might be some strange person walking around really is diminished. In fact, my opinion would be in order for us to continue to provide a reasonable degree of security and to minimize the possibility for problems I would probably change our current policy of locking at 11 p.m. and I would feel very strongly that we would have to have a central check point at every building. And quite frankly the cost of that program would be enormous. And as was (636) mentioned by Dr. Murabito yesterday under our guidelines of residence hall self-sufficiency those costs would be directly passed on to students. And other problems would be in the initial registration, in the initial determination of is this person invited, if that is the issue, are they invited, are they not invited. Somebody on my staff would be responsible for determining that, I feel. And are they a legitimate bona fide representative or are they not. And, again, given my current staffing and given the people that I have working for me and the work load they have there's no way in the world the would accomplish that without additional staffing. Which, again, would be an additional cost to the student. The disruption, again, I think is a very, very critical element. And I don't mean just the disruption from the particular sales presentation, but if in fact again we are talking about being invited, then the disruption that would become part of the picture in the process of getting invited, how many phone calls does it take to get invited? How many times do you have to talk to or how many people do you have to talk to and convince to come to your room to see an invited person give a presentation in order to get 10 people? Do you contact 20 people, do you contact (637) 30 people? You know, I think that those are disruptions above and beyond just what happens in that room during the presentation. And I have already stated that I feel that, you know, we have so many more things—

THE COURT: What are the disruptions that happen in a room during the presentation? Did you have an opportunity to see the—

THE WITNESS: The tape? Yes, your Honor, I did. And I saw it yesterday morning. I saw the 25 minute.

THE COURT: Just generally what disruptions would there be in the room?

THE WITNESS: Okay. Your Honor, I viewed the tape, I'm actually glad I had the opportunity to see the tape. I had not had any interest after we got involved in litigation, I had no interest in communicating with the company nor being involved in a demonstration or whatever. But I'm very glad I had the opportunity yesterday to witness that tape. My understanding is that the total presentation takes about two to two and a half hours. Even though the tape that I saw was only 25 minutes. It was an edited version. My understanding, also, is that part of the claim (638) here is that that two and a half hour presentation is educational, okay? My understanding from testimony that was given, I guess last week by students, is that the presentations generally would be taking place between 6 p.m. at night and 9 or 10 o'clock at night. Also, the hours that I have indicated, just a few minutes ago are our study, quiet hours. Also the hours that we rely upon, if you will, prime programming student development programming hours in our residence halls to provide activities and programs for our students. It is disruptive in my mind in the sense of what students could be doing, should be doing, the value that they would be getting out of studying for academic requirements, the value they might be getting out of learning how to deal with stress, learning how to deal with study skills, and so on, which are of immediate need to them versus the value that they will get out of two and a half hours of that tape of the presentation, given the fact that in my mind, your Honor, what they learn and what I learned, and I have to say I learned a couple of things myself during that 25 minute tape, but what they might learn in that period of time given their needs as—and I took it from the tape as freshmen, primarily freshmen and sophomore women, given their (639) needs at that place and at that time what they would benefit from doing many other activities on that campus that are

provided by the institution or that they should be doing related to their academics is so much more important to them than what they might learn as freshmen and sophomore women that they could probably learn after graduation, after learning how to make sound judgments as part of their education, be critical thinkers. Your Honor, our students don't come to us as freshmen capable of making—and this is borne out by research on human development—capable of making critical decisions, capable of looking at complex issues and discerning the facts related to those complex issues and making good judgments related to those complex issues. That is what an undergraduate education is all about. Yet—and those are the kind of things that they need to be developing and working on. Those freshmen women are concerned with survival, in my opinion, they are concerned with academic survival, they are concerned with emotional survival, they are concerned with social survival, just being accepted as part of a college community. And we are taking, disrupting, if you will, their educational experience two and a half hours to get what in my mind they could get talking (640) with a sales person for five minutes in a store. The difference between fine quality crystal, fine quality china, excuse me, what makes a good pot and pan, the heft of the pot and pan, and so on, those are things that they would learn during that two and a half hours that in my opinion are insignificant to what they might be learning if they were involved in some of the programs it is competing with, if we are talking about this prime time programming space of 7 p.m. to 9 or 10 p.m. at night that they could be involved with as members of our community.

THE COURT: You said you have quiet hour regulations?

THE WITNESS: Right.

THE COURT: With four hours a night for—

THE WITNESS: Right.

THE COURT: Monday through Thursday and they have to occur between 6 p.m. and 11 p.m.?

THE WITNESS: Sunday through Thursday, your Honor.

THE COURT: That doesn't mean, does it, and I may be wrong, that the student must stay in his room and study for four hours?

THE WITNESS: It does not mean that, (641) no.

THE COURT: A student is free to go to the library, go to the football game or basketball game or down to the coffee shop.

THE WITNESS: Right, that's correct.

THE COURT: But the purpose is to make it available?

THE WITNESS: Right.

THE COURT: If the student opts to use the room.

THE WITNESS: That's correct.

THE COURT: You weren't here last week, I don't think you were—

THE WITNESS: I wasn't.

THE COURT: There was a great deal of testimony from the students and it doesn't really—the Court could almost take judicial notice of it, the dormitories in college campus aren't utilized 100 percent for studying, there are other things going on.

THE WITNESS: That's right.

THE COURT: I have five children who have gone through, college so I know myself a little bit about it. I have been in dormitories. There are things going on other than studying.

(642) THE WITNESS: That's right.

THE COURT: All sorts of parties and things like that that the kids engage in. How would this type of activity be more disruptive than a beer party down in room 406?

THE WITNESS: Okay. If I could—first of all I would say that I wasn't here last week and I don't have the— didn't hear the testimony related to studying in dormitories, residence halls I prefer to call thm. On our campus for—I think since 1978 or '79 and if it makes a difference we could find out exactly if it was '78 or '79, I developed what is called a residence life survey for our residence hall students which gave me a—gives me the opportunity to assess the environment in the residence halls to see how we are doing, if you will. We have community development as one of our goals. We have staff and residence halls that we try to evaluate on a regular basis to see how they are doing. This survey is computerized so that we can break down the data floor by floor, building by building. One of the questions that we ask is where do you most frequently, most frequently study. And we give them choices, your room, a lounge in the residence hall, the library, the union building, academic building, (643) I think those

are the only choices. Maybe others. We may have another category, I'm not sure.

MR. REATH: Excuse me, your Honor. I'm going to object to oral testimony unless the survey is here and this is presented to me and I have a chance to see it and appropriately cross examine about it. It has never been identified as an exhibit. We have never been told that such a one exists.

THE COURT: Do you have the surveys?

MR. DOOLITTLE: No, sir. I have no intention of putting the surveys in evidence. I don't think it is necessary.

THE COURT: You have made surveys, based upon those surveys you formed certain conclusions?

THE WITNESS: That's correct. And consistently around 50 percent of our students indicated to us—

MR. REATH: I object to that, your Honor. Move it be stricken. He is trying to get in—

THE COURT: Tell me in your experience, from your experience which you already set forth on the record what utilization of residence halls do students use for studying as compared to other areas at Cortland.

THE WITNESS: Most students at Cortland (644) indicate that they study in their room most frequently. The library would be the second most frequent place they study. And then residence hall lounges would be the third, academic building and the union would be fourth and fifth. So it tells me—and, again, we are concerned with that. We tell students that when they walk in the door during orientation that you should be able to sleep and study in your room, when you want. I don't disagree with your Honor that other things take place. That there are parties, that there are watching football games. I'm sure there were many students last night on our campus watching Monday night football. But what I'm saying is that we cannot, nor—we cannot nor should we try to control individual students from watching television from play-

ing trivial pursuit, from playing cards. But what I'm saying is that doesn't mean therefore that we should open it up even further, in my opinion, to other activities which I believe are disruptive to what students should be doing. The reason we provide structure in the residence halls, we have quiet hours, it is unrealistic to say we should have quiet hours seven days a week 24 hours a day so the students can study. We know that's unrealistic. Other things do happen.

* * *

Cross Examination of Raymond D. Franco.

(655) A. "Saying that a woman was on her floor (10, Tower B) going door to door trying to book shows to sell chinaware. I told Nancy that as far as I knew this was not allowed in the residence hall and to ask the woman to please leave the building. A few minutes later Nancy called again and said that the woman told her that she had gotten permission from the hall director to be here and refused to leave. Nancy then asked me to come over to her floor to see what was going on. When I got to the tenth floor Nancy was waiting at the elevator and took me to suite 1020 where—" I'm not sure what that word is. This woman, or—I don't know.

Q. I don't know, but whatever.

A. "The woman was talking to the girls in the suite. She introduced herself as Debbie Williams from the American Prestige Series. She said that she had a show to do at 6 p.m. which was cancelled and a show at 9 p.m. on ten in Tower B. Since she came all the way from Syracuse she figured she would stick around and go door to door to see if anyone would be interested in hosting a show.

* * *

(684) A. I feel that it can be enforced and we try our best to enforce it.

Q. I see. You are aware of the fact that there are frequent violations?

A. I'm aware of the fact that vendors come in frequently and post bills which we take down as soon as we see them.

Q. I see. And have you been shown or seen any of the exhibits that were offered by the students in this case containing photographs of bulletin boards and examples of materials that were posted on the bulletin boards?

A. No, I haven't seen any of that evidence.

Q. I see. Now, if a commercial tutoring service wished to advertise on a bulletin board that their services were available would that be permitted or prohibited?

A. No, prohibited.

Q. And the same rules that we have gone over with respect to what is—the students can do within their dorm (685) rooms also apply to whatever kind of material could be placed on the bulletin boards?

A. I'm not sure I follow your question.

Q. Well, any kind of an offering by a third party to sell for money or to furnish for money services or goods would be deemed commercial activity that is banned under your rule?

A. Any commercial person who is posting signs is prohibited same commercial person trying to get into rooms to do what they posted the sign about is prohibited, yes.

* * *

(695) Q. I show you a document marked for identification as P 53 which is a letter addressed to you from Mr. Edward Satell, president of American Future Systems, dated August 18, 1982. You remember receiving that letter, do you not?

A. I think I do, yes.

Q. I'm following receipt of that letter you had some discussions with Mr. Satell?

A. Yes.

Q. And in the course of that, among other things didn't you say to Mr. Satell that you would suggest that he direct his comments and requests to your boss, Dr. Ken Zirkle, who was taken vice president for student affairs at Cortland?

A. Yes, that would be an appropriate response from me, I think.

Q. And I now show you a document marked for identification as Plaintiffs' Exhibit P51 and ask you if that isn't a letter that was sent to Dr. Zirkle and a copy sent (696) to you?

A. Do you want me to—It is addressed to Dr. Ken Zirkle. I can read the whole thing.

Q. No, skim it if you want to.

A. It's copied to me so I take it as long as it was sent and I received a copy, yes, this is a letter to Dr. Ken Zirkle. I have no idea what the content of it is.

Q. Well, skim it to find out and I will represent to you it is substantially the same arguments stated a little differently that are asserted in the letter to you. But skim it over, if you want to feel more comfortable. I'm not asking any detailed questions about the content.

A. All right. Let me skim it.

(There was a pause in the proceedings.)

Q. Have you read enough to have a—now, would it be fair to say, and I'm saving time, that one of several things which Mr. Satell asked you about, you and Dr. Zirkle—

MR. DOOLITTLE: I didn't hear that.

Q. I say would it be fair to say that among that which you asked—that which Mr. Satell was asking you and Dr. Zirkle to consider was the possibility that you would make a distinction between invited and unvited (697) speech?

A. He makes a distinction in his letter so, yes, I would say I'm sure that the reason he made the distinction was to try to ask us to make a distinction.

Q. Right.

A. Which I don't think is our position to begin with. Since it's not a Ray Franco residence life, student affairs addition or Cortland College policy. It is the board of trustees policy. So we are not in a position to rewrite the board of trustees policy to make a distinction or not.

Q. All right.

A. Between uninvited and invited guest.

Q. Did you ever make any effort to bring to the attention of the trustees through appropriate channels a suggestion that they might consider drawing a distinction between invited and uninvited?

A. I don't recall ever making any effort.

Q. No. All right. And I think we have already established that you personally have never collected any data as to the potential impact of modifying that rule to merely eliminate uninvited randomly knocking on doors?

A. I don't know if I said I never collected any data. What I said was that I speak from ten years of (698) experience in my position and the interactions that I had with vendors. I never done a formal correctly constructed random sample survey of numerous institutions or anything else.

Q. And you have never suggested to higher authority that the possibility that you would be given authority on your campus to experiment to try a different rule?

A. I have never done that, that's correct.

Q. And, similarly, I take it you never received any requests from higher authority at SUNY Central to either collect data or to respond to—well, first to college data regarding the impact of—of distinguishing between invited and uninvited guests?

A. That's correct.

Q. And, similarly, they have never asked you to consider experimenting with a modification of your total ban?

A. Correct.

Q. When you got the letter from Mr. Satell and had subsequent discussions with him did there come a point in time when you told him that you had been instructed that you should not have any further discussions with him?

A. I can recall saying that, I think, yeah.

* * *

(719) THE COURT: And that that would—you don't have the staff to do that.

THE WITNESS: That's correct.

THE COURT: Would require additional people and, of course, if you require additional people it cost money.

THE WITNESS: That's right.

THE COURT: And under your system, and I think it was testified to the same thing in Albany, that that type of thing is charged back, would have to be charged back to the students.

THE WITNESS: That's right. That's a system-wide budgeting premise that residence halls are now responsible for paying their own way as opposed to receiving—

THE COURT: The expenses go up in a residence hall.

THE WITNESS: Rent goes up.

THE COURT: That is allocated and figures which determine the rent?

THE WITNESS: Absolutely. Absolutely.

THE COURT: All right. Do you have any idea—

THE WITNESS: What the cost would be?

THE COURT: What that cost would be?

(720) THE WITNESS: I can very quickly, just to give you an idea, if we started at 24 hours a day, and some schools do have a 24 hour a day desk attendant, okay, 24 hours a day times $4 an hour for the sake of—let's say $3 an hour, if you want to pay below minimum wage, would be $75 per day times 14 buildings. Seven days a week, 32 weeks a year. So I think you could quickly figure—75 would be about roughly $900 a day for 14 buildings, 7 days a week, $6,300 a week times 32 weeks. Thirty-two weeks is the academic calendar. That would give you $9,000 times 32 is $250,000-$260,000, just for our campus. That's at $3 an hour. So it's $3.50 an hour its even more. It's substantial. Our total operating budget is $4.3 million. So we're talking—if we're talking $250,000-$280,000—

* * *

Direct Examination of Vincent O'Leary.

BY MR. DOOLITTLE:

(746) Q. Now, Mr. Doellefeld was here earlier in this trial and he testified concerning something that he referred to as the podium policy. Are you familiar with that term?

A. Yes, I'm familiar with it.

Q. Could you describe to the Court what the podium policy is?

A. When I became president I became aware that it was difficult to walk into the campus center, which is the major focus of activity on the campus, cafeteria, etc., because it was difficult literally to get through all the people selling things. And I began to make inquiry as to why is this occurring. I discovered that there was a board of trustees policy that had restrictions on this and so I began to ask well, why don't we enforce this policy.

THE COURT: What policy?

THE WITNESS: The policy I just referred to.

THE COURT: 66-156?

THE WITNESS: I believe that's the policy, yes. So it applies to the whole campus. And the board of trustees for a number of reasons, I suppose—I won't speculate. In my own view I think (747) I could understand if I had full charge if I wouldn't be looking at a similar type of policy. But put that aside, there it was anyway. I found out that over the years when Albany was a four year, essentially, very fine teachers' college the power of solicitation had been given to students. The president at that time had in mind, I learned, should the Red Cross be able to come on the campus and ask money from students and the Salvation Army, who should be able to come on the campus. And the president, not like most, not wanting to be bothered with that gave that power to the student government. What happened as time went on that word "solicitation" reached activities not of the kind I described to you but people who would be selling radios, selling a variety of things on the campus. Jewelry, coats, lots of clothing, etc. And so we at one point in the chronology called it to the attention of student government that there was a restriction on this, it wasn't simply meant to allow campus to have everyone come on the campus and start selling things on the campus. So we developed a policy or annunciated a policy, I don't remember, Mr. Doolittle, precisely, but my recollection is somewhere around 1980, sometime in late '80, perhaps, calling on the student government to make certain that (748) the persons who came on the campus were not outside that policy. We tolerated people who essentially we said that was for students. If students, for example, traditionally wanted to sell donuts for their fraternity they ought

to be, I know you can stretch commercial policy to anything, but it seemed to me that that was not commercial in a sense that I understood it to be. So that we allowed students to carry on that which was traditional, the selling of donuts, the kind of activities the students traditionally engaged in. So we put a policy into effect in 1980 calling that these—this is for the students, these are supposedly student operations. And we expected therefore to see students on the campus selling donuts or whatever they made to their fellow students using the benefits of those not for their personal profit but to go to a football game or do the things that students do.

Well, I soon discovered that some how or another that's not what happened. Within a few weeks I found I had more out in front than I had before and now I guess it came to a head one day when somebody brought what it called an army, I don't know what an army and navy store looks like, you Honor. Well—well, I had an army and navy store in (749) front of the campus going through coats and I was saying how did this get here?

THE COURT: Where were they operating then?

THE WITNESS: In front of the campus center, literally in front of the campus center. This is a space something like—

THE COURT: Student ingenuity.

THE WITNESS: Well, the point is, your Honor, I then discovered it didn't take long students were getting the permit from the students and the administration and in a sense then the people on the outside were coming to the students and saying would you like to make, look, a little money. And the next thing I know it is—see enough to become the broker. And I would look at people and say are you a student and somebody with a heavy accent or something else, you know, where did they come from. And we had to go through all kinds of inquiry, found out people weren't students who were there. And I guess Mr. Doellefeld testified, I suspect he spent a good deal of his time trying to settle this policy and he was getting very worn out. It's a lot of work because there's, you know, a great pressure to get at that particular audience. So we finally most recently have (750) the latest version of that policy, the so-called solicitation policy as follows. We will allow students to make sales provided it's a student organization, not an individual, it is a student organization. That all the proceeds go to the student organization. Somebody is not making an individual profit. And so today—and then we would limit the number of tables. I think it's eight tables outside. That policy is now in effect. It is outside the campus center. Mr. Doellefeld has responsibility to oversee that. It is under his eyesight, your Honor, he can see it. So if something strange appears he can get out there. But he has to spend a good deal of time sorting through that. It made clear that there is a substantial pressure outside to get onto that campus and sell and students can under the best of intentions, how you do that, students can be persuaded by material goods to act as somebody's intermediary in this situation. And I can tell you it's a fairly directly—it just takes a lot of time even when you have it in one place to observe it. So we are on that line. Is this in the board of trustees policy? It is an example of discretion, I suppose. Somebody could say now technically that is this or this. But in my view students, students total (751) profit, student groups only, that is a reasonable interpretation of that policy.

BY MR. DOOLITTLE:

Q. The Court inquired of Mr. Doellefeld and there was a discussion as to what this podium situation has to do with the residence hall issue involved in this case. Could you tell the Court—

A. Well, I guess part of the things that it made clear to me is that there is—there are a number of people who want to get on the campus at the State University of New York at Albany. It is pretty clear that that was one of the things we were dealing with here. And trying to put that in some sensible way for the conduct of the campus and meeting that commercial policy. There is a lot of people who want to come on that campus. The second issue is that well, I might as well do it, one of the things at least I observe in this case that the students in this particular case receive renumeration, whatever you want to call it, some reward for carrying out this particular demonstration. Once you do that not only is this at stake, but the possibilities of that are very strong, as we live with that. Thirdly, we are trying to, trying to enforce it

fairly so that people can carry out what is the spirit of the law or the policy.

(752) The third issue, and I think it applies here, is how do we do that in any practical way. I have a fulltime person who can look out a window, see all the goods being sold and the question is how in the world do you—how could you try to do that when you are dealing with—I don't know how many rooms we have, I imagine 6,500 students, a thousand rooms. So issues of the pressures from the outside, the possibilities, very, very strong possibilities of students being used to get access to the campus, and a third problem of regulation. I think that is a fairly direct set of concerns that I would have with respect to this situation.

* * *

(759) THE COURT: What do the suites consist of?

THE WITNESS: There is a variety of that, your Honor, but typically as I walk through a suite you will come in and there will be a room a little larger than your platform which is the common area and then there are bedrooms off of it. One bedroom that will handle one bed. Another bedroom that will handle two beds. Another bedroom that will handle three beds. They all come into that common area. And there are obviously bath facilities in that. So you will have six students in a suite. So that a certain economy of design, but it is one that makes us sensitive to how students relate to each other in those suites.

Now, in the tower we have a particular (760) problem that I wish I could bring Mr. Stone back and ask him to please do it in another way. A 21 foot tower provides you with—imagine a square tower going 21 stories. And an elevator going up and down the middle. Elevators among students are prone to injury, your Honor. And on a Saturday night some how don't look as good as they do when they were first built. Twenty-one stories and you have students in each of those corners so each of the floors in a sense because of their design become almost common areas. So it is best if you can get students who are not simply roommates that leave to get together, but those who are sharing this common floor, 21 stories high. That raises, you know, serious concerns that we have, safety concerns. There is nothing more—

nothing more in the university, somebody asked me the purpose of the university. The first purpose of the university is make sure people are safe, above anything else. An omnipresent issue in the dormitories is fire. And so we put as much pressure as we can to make sure that those dormitories are as safe as we can. So anything—not anything, but those things which have any kind of direct bearing on cluttering up the dormitories, make it more difficult to manage those institutions, if I can get an (761) alternative I will take that alternative. And something about this case, I guess, saying that, you know, there is a question as to are we concerned with controlling the lives of students. I'm not concerned—I'm not controlling the lives of students. I want to do only those things that are necessary for the orderly and safe operation of the dormitories. I haven't got the slightest—that is not—I want to provide opportunities, provide education. But I'm not interested in controling the lives of students. I am not interested in invading their rooms. But—I have to go in those rooms—somebody has to go in those rooms to know whether or not there is electric, open electric stoves in those rooms. We forbid that. And students, of course, like to cook in their rooms. And we have no cooking in those rooms. That is not allowed. And it is one of the areas, with all respect to the fourth amendment, your Honor, that we will go in and look for those kind of electrical—we instruct our staff, keep your eye only—keep your eyes averted from anything else and look for electrical outlets. And so as a general spirit of trying to do those things in the dormitories that make it safe and reasonably orderly.

* * *

(763) Q. If the university was to change its policy and permit students to invite commercial representatives into their residence halls what, if anything, do you forsee as a result of that change?

A. Well, first and foremost you would simply be adding more activity in the rawest sense, in the raw sense you would be adding more activity in what I can only describe to you as a person responsible for the orderly and safe management of those places, ultimately responsible, you would be adding more activity into that. I had one opportunity to read the Pennsylvania case that

as an organization were right on the ball, there were 51 (764) demonstrations planned in a two week period, when I had visions of that occurring at Albany and then, of course, we then have a problem of uniform enforcement. I suppose that Aetna Life Insurance would have the opportunity of coming in and Sears credit cards should have an opportunity, and I would then have just on the simplest level how to handle all that additional activity. I would then be forced almost—never mind the board of trustees' policy, I would be creating some part of policy called, I don't know, you can't—we can't just—people per square inch policy. I would have to do something like that. The obvious issues that come up beyond that, and I'm sorry I'm such a primitive level, but that's really where I am. I wish I had more dormitories. You would then obviously have issues of enforcement that would be substantial. If we drafted a policy and students would hold people in their room other than crowding the rooms, etc., obviously you would have to determine that, well, for example on the TV I saw here earlier the American Future's, is that right, American Future's Company in the sales demonstration were selling pots and pans. Now, luckily they are for the after life, out of the dormitories. But I would be very concerned if somebody began (765) bringing in pots and pans for immediate sale in that dormitory. I don't want pots and pans in a dormitory. I think that could constitute a clear and present danger bringing that. I have a whole series of questions about some how or other vetting that which is being brought in. I would have questions then of—unfortunately, on the American campus today physical safety is an issue. Women students particularly want to feel safe. They don't want to walk on campus in fright. They want to be free and walk across a campus and feel secure, not denying themselves the opportunity to go somewhere because they are afraid. And we have to respond to that. I'm sorry. That's 1986. So what we have to do now, we are much more sensitive than we use to be about who is in the dormitory. It use to be very open who is in the dormitories. Particularly our downtown—man walking through—who you are. We have people walking literally off the streets comitting burglaries and we have had, I don't want to get inflammatory, it doesn't happen that often, assaults have

occurred, not repeatedly, but it doesn't take more than a few that you have real reactions to that. So we have to know who is in the dormitories. To set that system up, please remember the context you are working in, (766) a tower, 21 floors, elevators, essentially each floor autonomous, you have to know—I mean Jim Doellefeld is looking out a window who is out there, who are you. Here I would—It wouldn't have to be a police state but I would have to start saying first, be very strong on locking all the doors. We simply lock the—you would have to eggress an entrance would have to be very tightly controled. It is now controlled but not to the degree that we would have to then. Because we have to know who is coming in. Then what would we have to do? I would have to know that there are no people in the dormitories who weren't somehow or other vetted and cleared. My experiences on the dormitory—on the podium, your Honor, tells me that I better be able to get out there fast and say who are you and what are you doing. If I have a series of closed doors I don't want to go in the business of opening doors. Because I think there are ten people inside and was this person really approved or not. I don't want to be in that. In some respects I discussed this issue with students on campus and they said well, I have a right to my room. Of course you have a right to a room. That's the last—I don't want to go in your room. Only for the purposes that I have to. There's purposes I have to (767) go in the room for the safe, orderly conduct—and then I would now introduce a whole new area of enforcement. What would you do? You hear ten people, somebody says I think they are, knock on the door, we'd be now involved with that kind of thing. So those are the concerns. One is simply the added activity in the dormitories. Secondly, is the whole control in those dormitories. These are large, large units. So all of that. The obvious, you know, could that be done at some price? Well, some of it couldn't be done at any price. I mean there's no way that I can handle the number of more people in those dormitories. That's just not a question of price. That's a question of space. Could we vet the other system, could we log them in, could we trace them down? Could you put enough people in the dormitories to know who's on every floor? Yes, but there would be a substantial cost that would have to be added to

there would be a substantial cost that would have to be added to that. And ultimately that would—some how or other you have to displace that. My guess is the reality of it that since a student now essentially pays for the dormitory their rates would go up. Maybe you could apportion a cost per square foot used or a light used. We haven't been into that with the dormitories, we haven't gone into that. To put on all the costs (768) associated with it. But there are substantial costs.

My major issue, my major issue though because my background I have been in that kind of drafting and regulating, I have some idea bout that, but my major concern here is really the disruption, the activity that's involved.

MR. DOOLITTLE: I have no further questions at the moment.

THE COURT: Cross examination.

Cross Examination of Vincent O'Leary.

CROSS EXAMINATION BY MR. REATH:

Q. Doctor, I apologize because you came in on the red eye and I'm sure last thing you wanted to is sit and watch a television demonstration on selling of crystal and cookware. But you did see it, did you not?

A. I did, sir.

Q. And did you have a chance to, within some degree of care and thoughtfulness, read over the affidavit of Drs. Morris and Krafft.

A. I did, sir.

Q. And I wonder do you suppose we could save a little bit of time by asking you whether there was anything in the ultimate conclusions testified by Dr. Krafft and Morris—

(769) THE COURT: He isn't through with the question. Did you finish yet?

MR. REATH: Not yet.

BY MR. REATH:

Q. Was there anything in the affidavits that addressed the values that they found in the demonstration from the student's point of view? Is there anything in there with which you would substantially take issue?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: What is the basis of the objection?

MR. DOOLITTLE: Well, I object to the form, number one. Number two—

THE COURT: Well, the form, I will overrule it because, again, we don't have any jury present. You are trying to get this to move along a little faster than we have to.

MR. DOOLITTLE: Number two, the affidavits are not in and have never been in evidence in this case. Those two gentlemen both testified here and—

THE COURT: Let me just say at this point his answer to that question really means nothing unless it is developed further. Because he's asked him whether he has any quarrel with the (770) conclusions in the affidavits. We don't know what the affidavits are. They are not in evidence, etc. If he says yes that means nothing. If he says no that means nothing. So it is not until we get at some later date when we get to what the conclusions are that your objection may or may not be proper. At this point I overrule your objection.

MR. DOOLITTLE: For the record, your Honor, this is beyond the scope of the direct.

THE COURT: That's all right. He can question him on his own, makes him his own witness. And this may not be beyond the scope of direct. I don't know what he is going to get into. Do you remember what the question was?

THE WITNESS: No, I don't.

THE COURT: Ask it again.

BY MR. REATH:

Q. The question basically was having read the affidavits of Drs. Kraftt and Morris in which they identified what they found were certain values of benefit to the students from an opportunity to see an AFS demonstration insofar as the values they found are there any of those with which you take strong exception?

A. If I remember, having read that, the general thrust of their response is that that which is seen on the (771) tape is an educational experience and therefore valuable. I would distinguish between experience and education. For me education is a process of trying to understand what has occurred to you, what has been experienced. To understand what that is, to be able to generalize from it, to enliberate, if you like, this is a very good—so in that sense it seems to me what I viewed here I almost felt like I was seeing, with all respect, a well done TV commercial. I don't know what the difference is. It was directed toward a purpose, there may have been some incidental information. But I doubt if I would call that in the context of what I mean an educational experience. I got information but it was very functional information. It was like a TV ad. At the end of perfectly legitimate things I want you to buy some of this material. You gave me something to read from Dr. Schmidt and I think—can I use the last line?

Q. Sure.

A. He said in that last line, "we have had the experience but we missed the meaning." Which is the essence of the education. And so I can't do anything better than Dr. Schmidt's line. It is not educational, it's good information.

Q. We will come back to this other subject in a minute. (772) I take it as far as—

A. I disagree.

Q. As far as Dr. Schmidt's position is concerned you don't take any exception to anything he said there?

A. To Dr. Schmidt?

Q. Yes.

A. No. I don't.

Q. And what he stated there you would agree is the proper function and role of responsibility of a university?

A. Dr. Schmidt was annunciating the responsibility of an academic institution, promote freedom of expression and freedom of inquiry. And certainly I would agree with that.

Q. Now, just a couple of questions. Several of the students have in this case testified that they went to this demonstration, not for the purpose of buying anything or ostensibly learning about cookware, but they went because they were interested just to see how one of these sales techniques was used. And do you recall that, I think it was Dr. Krafft, and possibly Dr. Morris, as well identified that and said that that would be a valuable experience for a young person who wanted to see a selling technique used by obviously a merchandizer that has carefully studied (773) its problem and presumably is doing a good job?

A. Yes, if—

THE COURT: Go ahead.

THE WITNESS: I'm sorry, Mr. Doolittle—

THE COURT: Mr. Doolittle stands up and down, but—

MR. DOOLITLLE: Part of the time I just can't—

THE COURT: I don't watch him. If he has got an objection I will listen to him. But up and down means nothing.

THE WITNESS: Very good. That is a general argument which says that all which is experienced in life is useful. And I don't quarrel with that. Some students like to go to motorcycle races because they learning something about driving an automobile. Some students—a variety of things. At one time the university, I'm sad to say, use to give credit for walking dogs. This was the late 1960s. Now, I respectfully disagreed that walking dogs should get college credit. You may take that view.

Q. Good for you.

A. So we finally got a little clearer on our values in (774) an institution and we said something about, as I described before, it is not simply any experience randomly described. Education, on the other hand is, I guess, what is called examining that experience, understanding that experience. So with respect to my colleagues it is one thing for a student to sit in, I know a little something about group dynamics, it is a little something for one thing to sit in a group to learn. But you better have somebody

who can say now let us take a look at what happened here. Nobody stood, for example, and said now notice had these requests were carefully presented. Two words were said about when you are going to go home after your graduation. You would need china. And, by the way, you get a trip to Hawaii. What's the juxta position of that. So I put to you to answer in general, more succinctly, experience as such a one could call everything educational. We have learned in the university, sad to say, that everything is not educational in any sense of being liberating, analytic and enabling rather than simply experienced.

Q. Okay. It should have been explained to you, and I'm afraid it wasn't that this was a very tightly edited and the edits have been explained to other people, it shifts from subject to subect only because it was (775) intended to be a representation of a sample of something that took considerably longer.

A. Is there another part I would have been—

Q. You only saw an isolated representative sample just to get the feel and the flavor of the kind of thing that goes on.

A. Then I responded to what I saw.

Q. Of course. Perhaps I used the wrong word when I asked you to agree whether it was "educational". Would you agree, one, as I think everybody else in the case has agreed to, that there is information imparted which those attending may well learn for the first time?

A. Yes, there is information imparted that those—some will for the first time have had received that information.

Q. Right. I mean the routine things such as how to identify good china, correct?

A. Well, I would feel safer if I had somebody telling me how to identify a good china who was not selling china.

Q. I understand that. But whether that is a matter for the listener to make his or her own evaluation, is it not?

A. Yes, but then I was—well, word games. You are describing—you said information which is useful. Is there information which is useful. I will respond (776) it may not be useful or it may be useful. We have to have some criteria.

Q. And often one of the things a participant at one of those programs has to make his or own value judgment as to how much to accept for that very reason?

A. Like a TV ad. I mean, I expect 20 minutes in front of a good set of commercials on TV has about the same content of learning, if there is—my sons and daughters could have watched TV for a long time and purchasing Toyotas, etc., etc., they will learn something. Yeah, if that is the level of learning you are talking about that's the level.

Q. That is one aspect. That's one aspect.

A. Okay.

Q. Another aspect which was focused on by Drs. Krafft and Morris was the opportunity that young people have to make choices and to make decisions. You will recognize that that is a value that has value to the young people participating, would you not?

A. Again I would have to couch it, as I said a few moments ago. May I take a step forward and say as I understand what we are—you tell me, your Honor, to shut up.

THE COURT: Go ahead.

THE WITNESS: But I understand we are (777) saying should a—what the implications of this is therefore the policy of the State University of New York should be to provide this opportunity. I would simply point out to you that what is being described is about the same, almost identical level of that which you learn from a TV ad. Now, we could go ahead and talk about that, but I would not justify a university which has a number of other competing things I want them to learn putting their resources here or preventing students from learning some other things. They learn something from a fight in a hallway.

Q. You would recognize, would you not, that the student having an opportunity to participate in one of these demonstrations could, from their point of view, feel that they had gotten something out of it?

A. A student could feel that way.

Q. Right.

A. Yes, sir.

Q. And had gotten perhaps more out of it than just being exposed to the opportunity to purchase goods?

A. I suppose one could have that same reaction to a TV—I learn something, you know.

Q. Let me read to you from paragraph 8 of the Krafft affidavit where he says, "if a student participating (778) in an actual group demonstration can examine and understand that a sales person is doing and the sales strategy being used then that student will learn from that experience." Would agree with that?

MR. DOOLITTLE: Objection, your Honor. It is not proper—

THE COURTS: Again, this affidavit isn't in evidence. But what you are asking him is whether or not he agrees with that statement.

MR. REATH: Yes.

THE COURT: It happens to have been made by Dr. Krafft.

A. Well, I agree with the statement and it's precisely what I found wrong with the ape. Notice the question. If the student is enabled to understand what is happening to him. The techniques of persuasion, the very carefully—but legitimate, calculated things that are meant to encourage me to take one course of acation than the other. Sure you can learn out of that. I use to teach it. That didn't happen here.

Q. Well, it didn't happen in the sense that this wasn't intended to be a formal educational seminar, obviously.

A. Well, the paragraph you just—could you reread it? I noticed the word "if".

Q. "If a student participating in an actual group (779) product demonstration can examine and understand—"

A. If he can examine and understand.

Q. "What a sales person is doing—"

A. What a sales person is doing.

Q. "And the sales strategy being used then that student will learn from that experience."

A. I would suggest to you that is precisely what is not happening here. Who is helping them analyze, look—

THE COURT: You agree with the statement, though?

THE WITNESS: If he could do that, your Honor, yes. Yes. If I were in the room, and let me just tell you what manipulative—well, those are value words. But what cues, how people are now trying to persuade you, what you are not really seeing is the other—this is great glassware but there is really other glassware. She not only told you this, she didn't tell you this. She offered you rewards, built up group persuasion. Do you understand all the things happening to you? If that happened it would be a great experience.

BY MR. REATH:

Q. And it is possible, is it not, that all of the things that you are talking that one should be looking for might have been discussed in a formal class on the (780) college campus?

A. Well, but the point, the very point, if I may, not to be argumentative, he is a group dynamisis, I believe, and his whole purpose is to learn, not in the abstract the whole experiential basis of learning is you have to have what occurs, what you see, and from what occurred you learn. It is precisely that what he doesn't want you to do, learn in a classroom. He is arguing, and I would—if he were in the group and he did the analysis that would be fine. But he is arguing that you can learn from this experience. But you can't teach if somebody is not skillful enough to understand and analyze what's happened.

* ** *

(789) Q. Thank you. Now, I believe that the stipulation Exhibit A, establishes certain facts relating to the resolution 66-156 about which, we have been talking. And just as by way of background I want to read to you paragraph 5. "Regulation 66-156 of the board of trustees was enacted in 1966." You obviously accept that statement?

A. I was so advised when I saw it, yes.

Q. Now, and that is a regulation, I think has been established, but least there be no doubt, that is a regulation that was esiablished by SUNY or—

A. SUNY.

Q. All right. That was a regulation established by SUNY to apply to all of those colleges and universities within the SUNY system?

A. Yes, sir.

Q. Now, I will represent to you that in other testimony that has been received in this Court or will be offered that Mr. Satell, one of the—president of American Future Systems, has since 1977 and again in 1982 brought to the attention of the SUNY officials the request that they consider a rule that would draw a distinction between the invited guest by the student and the invited solicitor who comes on to campus seeking to randomly knock on doors, okay?

(790) A. Yes, sir.

Q. Now, can you tell me if at any time to your memory you or those under your control have been requested by SUNY to collect data that would record the various incidents of security breaches or others such problems and to delineate within those breaches between the so-called invited guest on the one hand as opposed to the uninvited guest on the other?

A. I'm not familiar with any data collected specifically in the terms that you announced.

Q. I See.

A. Annunciated.

Q. And to your knowledge I take it that you have not had any such similar data prepared and collected for you on a regular basis at SUNY Albany?

A. None that I have asked nor none that I have examined. There are many types of data but the very narrow specific question my answer I have not seen that.

* * *

Direct Examination of Dr. Jeffrey B. Morris.

(2) Q. Dr. Morris, would you state your full name, sir, for the record.

A. Jeffrey Brandon Morris.

Q. And where do you live?

A. The exact address, 4510 Kingsessing Avenue, Philadelphia, Pennsylvania.

Q. And you are a tenured faculty—tenured member of the faculty at the University of Pennsylvania?

A. I am an untenured member of the faculty at the University of Pennsylvania.

Q. And in what department?

A. We hope we can cure that very shortly.

Q. Okay. And in what department, sir?

A. Department of Political Science.

Q. I show you a document marked for identification as Plaintiffs' Exhibit 40, which is your curriculum vitae and ask you is that a document that you are familiar with and that you had prepared?

A. Yes, it is. I am familiar with it and I prepared it.

(3) MR. REATH: Your Honor, a copy of that is attached as part of our pre-trial memorandum as Exhibit D.
THE COURT: All right.

By Mr. Reath:

Q. And are you satisfied that the information contained in there is correct?

A. I am.

MR. REATH: Your Honor, I offer into evidence Plaintiffs' Exhibit 40.
THE COURT: Any objection?
MR. DOOLITTLE: No, your Honor.
THE COURT: Received.
(Plaintiffs' Exhibit 40 was received.)

BY MR. REATH:

Q. Now, recoginzing that that is in evidence and available to his Honor to read at his leisure, very briefly tell the Court in your own words your educational background and any teaching or other positions that you held that lead up to your present position.

A. Well, I went to Princeton as an undergraduate and I went to Columbia Law School. And after that received a Ph.D. in Political Science from Columbia University. And I taught for six years in the Department of Political Science of the City College of the

City University and (4) left City to serve for two years as a Special Assistant to the Vice President for Academic Affairs and Provost at Columbia. And I left Columbia after those two years when I was chosen as a Judicial Fellow at the United States Supreme Court. And I then remained beyond my fellowship years to serve as a research associate to the Administrative Assistant of the Chief Justice for another four years. And after that I returned to college, teaching at the University of Pennsylvania.

Q. And you have been at the University since then?

A. Since 1981.

Q. And continually as a memer of the Political Science Department?

A. That's correct.

Q. And as far as your writings, any other special information about your qualifications set forth in the CV which includes, I assume, will include by title in this testimony.

THE COURT: I am not sure I follow the question.

Q. In other words, may we assume that if you took the time to take you through all those other materials in the resume that you would be able to bring them out on oral testimony.

A. Yes.

(5) Q. All right. Now, are there any—you have given us your general background?

A. Yes.

Q. In a word or two. Other than what you have already referenced are there any other special achievements or recognition that you've had since you have been in the teaching profession?

A. Well, I was proud of receiving the Lindback Award for distinguished teaching at the University of Pennsylvania.

And I don't know if it is directly related to teaching, but I was proud to be asked to write the official history of the Second Circuit.

Q. That is the judicial history?

A. That's correct.

Q. I see. Okay. Now, you are being offered here today as an expert academician regarding educational matters affecting the role of a university, correct?

A. Yes.

Q. And also you are being qualified you are being asked certain information regarding your expertise in administration, particularly with reference to residential life, is that correct?

A. That's right.

Q. First with respect to your qualifications as an academician relating to educational matters, would you (6) advise—would you state to his Honor out of the total experience those matters which you feel most particularly qualify as an expert in that area.

A. Well, I suppose to begin with I taught college for eleven years at one time or another. I have certainly served on a fairly full range of academic committees, most particularly, I suppose, for three years each time on the college-wide curriculum committees both at City College and at Penn, at the University of Pennsylvania. When I was at Columbia I served for two years while I was Special Assistant to the Vice President for Academic Affairs I had authority for the advancing of interdisciplinary programs of various kinds and a number of other staff and line responsibilities that fall to the Vice President for Academic Affairs.

Q. And did this involve curriculum and matters of education?

A. This involved curricula, this involved the generation of academic programs, involved qualifications of faculty, things of that sort.

Q. And then did you reference your membership on the—at City College as a member of the college curriculum committee?

A. As I said, I was on the college-wide curriculum committee for three years.

(7) Q. I see.

A. And I was at Penn, as well.

Q. Then I believe there is also—my notes indicate that you were on the Dean's Committee at City College to establish an AB-JD Degree?

A. That's correct, as well. Yes.

Q. Okay.

A. And on a whole host of other academic committee's that I wouldn't bore the Court with.

Q. Right. Now, with respect to the second facet of your expertise, which is administration and residential life, would you please identify for the Court the experience that you've had in those areas that would qualify you as an expert.

A. Yes. Well, during my years at City College there was no residential life on campus. So my experience there with residential life is not helpful. In administrative matters, however, I was tied-up again on a—this was a tempestuous time in the life of universities from 1968 to '74, and especially in the City University of New York. And I was involved as Chairman of the Student Faculty Committee, I was involved in a series of committees and *ad hoc* assignments connected with various aspects of student life and regulations at Columbia. The area of responsibility beyond that of (8) development of interdisciplinary programs, it was so important I was largely the chief person in the office of the Vice President for Academic Affairs who was concerned for matters of student life. And, obviously, in that role dormitory matters came to my attention. I did not have line responsibility; I had staff responsibility there.

Q. Okay. And then what about during any period of your relationship at the University of Pennsylvania.

A. Well, I suppose there are two things of some interest. When my family came to the University of Pennsylvania in 1981 we were asked to and agreed to serve as a faculty family in residence in one of the college houses at Penn. And so for two years we lived with the students, dined with the students, participated in informal academic matters within the college house and had rather sparing direct administrative kind of duties. We mainly lived with and were with them. And I just finished a term as a member of the President Hackney, the president of Penn, Special Study Group on Student Affairs which dealt across the board with student matters, including residence halls.

Q. Okay. Now, you were in Court this morning, were you not?

A. Yes.

(9) Q. And you heard read into the record when Mr. Cawley was being examined statements by the president of the University at Albany and similar statements as to the educational mission at Cortland?

A. Yes, I did.

Q. And would you comment, sir, as to your views, whether you agree or disagree with that that was presented this morning?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Sustained. We ought to have it a little better defined. You should ask him specifically about it.

MR. REATH: Yes.

Q. Would you state to what extent your views of the role and function of a university comport with the position that was presented by those materials that were read in Court this morning?

MR. DOOLITTLE: Same objection.

THE COURT: Same ruling, sustained. What are we talking about? There is a lot of evidence gone into this morning.

MR. REATH: Well, I'm only limiting—just the statements that were read.

THE COURT: What statements? There (10) are all sorts of statements.

MR. REATH: The statements that were read of President O'Leary.

THE COURT: All right.

MR. REATH: And the other statements from the handbook relating to the educational philosophy at both Cortland and Albany as to what a college education is all about.

THE COURT: If Mr. Doolittle continues to object I will continue to sustain it unless you refer him to specific statements.

MR. REATH: I was just trying to save time. Of course I can, I will, sir.

MR. DOOLITTLE: I have another objection, too, in that he's been proffered as an expert and I don't believe that he has been qualified as an expert yet.

MR. REATH: If you want to have voir dire—

MR. DOOLITTLE: I am challenging that.

THE COURT: No, I am going to accept him as an expert on the matters before the Court concerning academic and/or residential life of students. He can give an opinion. The weight I give it will be reflected by my evaluation of his expertise therein.

(11) BY MR. REATH:

Q. I direct your attention first with respect to the material which was read from "Viewpoint 85-86" from P-25 this morning, which was the president's message by Vincent O'Leary. You have read that before, have you not?

A. I have not read that before.

Q. Didn't you read it last night?

A. Not in this book. I did read in a small handbook.

Q. I see. You heard it read in Court this morning?

A. I certainly did.

Q. And directing your attention to the document, and I just show you my copy that is marked. You are familiar with that, are you not?

A. Yes.

Q. And would you state—

THE COURT: Which statement are we talking about now?

MR. REATH: The statement of President O'Leary, your Honor, the President's message from page five of "Viewpoint 85-86", which is P-25.

THE COURT: All right.

BY MR. REATH:

Q. And insofar as that is a statement of educational philosophy as to the role and function of a university (12) and how residential life comforts—the part that residential life plays in the overall education of the university, what is your view as to that statement?

A. Well, I was very strongly in accord with that statement and, if I may, if it is appropriate, I would just read two of the sentences here that struck me, and then maybe say a word or two about them. But the president seemed to have said we are a learning

community in that significant growth takes place in both the university's working environment and in its living environment. And then, if I may just drop down to the middle of that, the vitality of the campus environment beyond the classroom, although the concern of many dedicated staff, is even in greater measure within the control of students. What you do for each other in residence halls, on athletic teams and in the many other organizations and activities as—and then he lists various things, shapes the quality of life on this campus in an important way and constitutes a very tangible part of your growth in college and, actually, if I could be allowed one more phrase, the essence of the adventure is to grow in intellectual competence, to become comfortable with the world by coming to a better understanding of its workings and of your best place within it. Well, I agree with that thoroughly. I wish I said (13) it myself. And the period of time, the years we are talking about, undergraduates between 18 and 21, are enormous years of emotional and intellectual growth. And both of those take place, both in the library and both in the classroom and outside.

Q. Okay. Now, you are familiar, are you not, with the testimony that has been offered in this case, particularly by Dr. Hostetter, wherein in explaining the university's justification for the total ban on any kind of commercial activity that he said that one of the principle purposes was to maintain an educational atmosphere and the educational mission of the college?

A. Yes, I'm familiar with it.

Q. Now, would you state to his Honor your view as to whether or not such a ban furthers and advances that goal?

MR. DOOLITTLE: Objection. I don't think he's qualified.

THE COURT: Sustained. First of all establish that he is familiar with the ban.

MR. REATH: I thought I had, sir.

THE COURT: You are using your own words. It is a question, legally, what kind it is.

BY MR. REATH:

Q. I direct your attention, sir, to paragraph 9 of a stipulation which has been received in evidence in this (14) case and reads, "pursuant to Resolution 66-156 of the Board of Trustees, as attended—and, by the way, you are familiar with that underlying resolution, are you not?

A. I am.

Q. Pursuant to that resolution as amended and as applied and enforced throughout the SUNY system students on SUNY campuses are prohibited from inviting into their dormitory rooms commercial enterprises which furnish information, provide a product or service with the end result is the intent to make a profit by the invitee.

A. I am familiar with that.

Q. Are you familiar with that?

A. Yes.

Q. And now having referenced the testimony of Mr. Hostetter as to the reasons for justifying that rule would you state to his Honor whether in your opinion that rule advances that objective?

MR. DOOLITTLE: Objection.

THE COURT: Well, again, sustained. So we get it clear, what reason justifying?

MR. REATH: The reason of preserving, protecting the educational atmosphere and furthering the educational mission of the college.

THE COURT: He said that was one of (15) the reasons.

MR. REATH: He said it was the principle reason, sir.

THE COURT: Why don't you give him the quote.

MR. REATH: Yes, sir.

BY MR. REATH:

Q. Let me read to you two portions of Dr. Hostetter's testimony, the first taken from page 19. After asking him about the resolution I said, "and tell me, if you will, what was the reason for it being put into effect at that time?" "Answer I believe as I read the minutes, just the very brief statement that was in the minutes, it was an overriding concern of the trustees about making sure

that our residence halls were to be prime places for educational activities as opposed to something else." And then let me read to you from page 65. In answer to a question by me I said, at the bottom of page 64, "now, tell me, if you will, what goals and interests of the state are being implemented or furthered by the maintaining and enforcement of the regulation that we have talked about?" "Answer, the university is an agency of the state, that is what you are saying?" "Yes." And then a colloquy, and then it goes on to say—Mr. Doolittle says, "excuse me, I don't believe the (16) witness understands the question." I said, "I think he does." And then he gave the following answer: "I see it—" This is from Dr. Hostettor, "I see it from an educational point of view and, you know, if I'm trying to relate it then to a state issue which I see is something different, I guess it really isn't different from the educational point of view. We certainly see that the university has an educational responsibility as opposed to a commercial responsibility. And in carrying out our duty of education the young people that come to us we see the regulations as preserving for them an atmosphere, a setting in which they can place their prime attention upon what they are in the institution for, namely the education, the education that is there, they are there to receive. In that sense I think we are fulfilling the state's interest in this. The state, if you will, has allowed young people to set aside time to do this, provided the institution, provided the money. And there is a time and place for this to occur and therefore we want to make sure that the atmosphere is such that it can occur to the best of our ability." "Question. Is that the only reason?" "Answer. That is the prime reason that I can think of now." Okay.

A. Yeah.

(17) Q. All right. Now, having heard that testimony in relation to the testimony as to the educational goal and the mission, would you state to his Honor whether in your opinion the rule that they adopted, which has been established and which I just referred to, advances and is reasonable and necessary to carry out that objective?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Overruled. He may answer.

A. It doesn't seem to me to be reasonable. It doesn't seem to me to be necessary. It doesn't seem to me to be effective. And it certainly seems to me to be in contradiction of the statement we read of President O'Leary.

Q. Would you explain to his Honor the reasons you support that position?

A. Yes. As best as I can understand that position, Mr. Hostetter is essentially narrowing the word "education", as best as I can tell, to mean study hall and studying. And, as best as I can tell, he is trying to protect that particular environment for study. Now, I would think as a practical matter, or matter at least of general knowledge, that dormitories generally (18) are not very good places for study, that all sorts of shenanigans go on and pranks and drinking and so forth, that occasionally people do try to study there. But that is, as a practical matter, whether there is or there is not commercial activity I suspect is not going to change the study environment very much. But, beyond that, of course, the deeper aspect to it is that it narrows the term "education" simply to that of studying rather than of students learning from each other, students learning about aspects of life, different lifestyles, different methods of involvement with one another, which is a very important aspect of education, of growth during the college years.

Q. Okay. Now, doctor, you have seen an actual AFS demonstration, have you not?

A. Yes.

Q. And you have also seen the tape?

A. Yes.

Q. Just briefly, the circumstances, tell his Honor the circumstances under which you personally observed an AFS demonstration.

A. Well, I personally observed an AFS demonstration when I was faculty resident at Van Pelt College House, I think in 1982. And it was a demonstration that went on with a number of students that I attended.

(19) Q. And how, in general terms, without reference to the specific content or words that were used, how did that compare with the one that was exhibited on the tape that has been shown here in Court to his Honor?

A. Now, Mr. Reath, I can't say directly what has been shown to his Honor, since I didn't see it shown.

Q. You have seen the demonstration tape?

A. Yes, I have.

Q. And that is the one that we are referring to.

A. Well, what I saw at Van Pelt and what I saw on television were exceedingly similar.

Q. And will you state to his Honor what were your impressions that you took away from having observed this demonstration in your—in the residence hall where you were a resident master?

A. Well, it was low key, it was dignified. There were— it was quiet. There were informational qualities and there was salesmanship, all of those things.

Q. Okay. And would you state to his Honor whether you perceived from the four corners of that demonstration or another similar one such as on the tape values that were other than pure commercial?

MR. DOOLITTLE: Objection, your Honor. This is not relevant. We have already been through the question of whether the AFS thing is (20) educational or not. It doesn't make any difference.

THE COURT: Overruled. You may answer.

A. Well, yeah, there are certain—let me divide it into two parts, if I may. One, I think there are certain informational qualities dealing with nutrition and the qualities of China and things of that sort that are in the demonstration. So there's certain informational aspects. And then it seems to me there are the process qualities that are involved in the demonstration. Now, I, you know, as someone who teaches constitutional law and teaches it socratically, I think it is a method that helps people learn well. And the interchange between the—the interchange between the students and the hostess, the interchange between the students and each other, the talking back and forth, I think

there are clear educational virtues of that. I think, as well, this is one other area where students have to begin to make certain kinds of choices and priorities and things of that sort that they may have been sheltered from at home and they may otherwise still be sheltered from in their late teens or early twenties. I think being confronted with that has an educational quality as well.

THE COURT: How is that any (21) different, though, from an incident which a student would run into day in and day out outside of his room? Everything in life has some educational value. When he goes to the corner clothing store to pick out a sweater, he looks at the quality, he talks to the salesman, maybe looks at the price. Then he goes to the next store and compares it. That has educational value. Then he goes to the grocery store, when he talks to somebody over the phone about some subject, when he watches television, gets a pitch on television, is this particular AFS demonstration which occurs in the room of some unique benefit to the student which he wouldn't receive every day?

THE WITNESS: Can I answer that in two parts?

THE COURT: Yes.

THE WITNESS: What I would like to do is sort of answer my own part of it first and then try to address it directly. My own part would be it would seem to me part of what strikes me this case is about is whether the university should be shutting off areas of education that are part of life. So that to some degree I mean do is want the university, for example, saying to its students that they shouldn't go to the local store and buy a sweater. So your basic (22) premise I am in accord with. I think all of life is educational. You are asking me and I'm saying that the university shouldn't be in the business of shutting off whole areas of education. So that is one point.

Then you are asking—the real question you are asking, of course, does this have some what more educational value than going to the local clothing store and buy a sweater. Let me answer that, if I may, in two parts, too. I understand at least on one of those campuses that that option may not even exist, that we are dealing with very little commerce in the town. Beyond this, there may or may not be a difference. I would say at least

what this does do is gather in a room for an hour or hour and a half what we now see generally tends to be a corps of about ten people focusing about an issue, an issue where it would seem to me there is a certain inherent tension, since undoubtedly the students don't necessarily want to buy or to spend money. And so that minds are focused on a particular problem and a great—and on issues, for example, of the credibility of the hostess, the credibility of the sales pitch, and so forth. I think we have something, your honor, here, that is likely, it seems to me, to be somewhat more alive, somewhat more real and somewhat broader in the perspectives being (23) brought to it than simply one or two students going down to a local clothing store. And, of course, it is also less passive than, say, six students watching television.

THE COURT: What you are saying is, if I get the substance of your testimony, is that the benefit to the student in having that type of opportunity available to him, that is to see, to participate in a demonstration or show, whatever you call it, outweighs any interest of the educational institution in prohibiting that type of activity on the assumption that it will afford the student in residence a better place to carry out his "study" aspect of his education?

THE WITNESS: Given the sets of facts as I understand it in this case and in the state university system, and so forth, I would, indeed, say that.

THE COURT: All right.

THE WITNESS: Do you want me to elaborate?

THE COURT: Yes, please do.

THE WITNESS: And stop me if I repeat. It would seem to me that the gain for the university or the announced state purpose here of providing a better "educational environment" probably is (24) incremental, very, very incremental, at best, if students are doing the kind of things at least I'm accustomed to knowing students do in dormitories and they are drinking and watching television and they are talking to their girl friend, and so forth. So it would seem to me here preventing a group of ten students getting together in a room or where ever for an hour quietly is, I would think, a marginal, marginal benefit in protecting the edu-

cational environment. The gain educationally is not profound, of course. But I think it would clearly be greater and I do think that it certainly—on some of those campuses students may well be pretty well isolated from real life type things like salesmanship. I think that that is true. In some ways I suppose this would be analogous to also a university allowing on campus some very extreme religious factions, too. I mean, students—I'm not trying to equate them to AFS, but I am only saying in terms of the educational experience I think it is exceedingly important that students come to terms with great differences, the kind of pluralistic complexity that makes life exciting. Certainly it seems to me that is what a university should be about.

THE COURT: All right, thank you.

BY MR. REATH:

Q. One last question, and that is I think it is perhaps (25) implicit in what you said, but, for the record, what is your view as to the proper role of the university vis a vis the concept of inlocoparentis?

A. Well, I think inlocoparentis is largely dead and should be largely dead. I think we are dealing here with young adults, we are dealing here with people who have served in the armed forces, and so forth. And I think a university's role ought to be educational. I mean in that I can accept the language used by Mr. Hostetter. And that should be the university's concern. And when I went to college, Princeton had rules about attending chapel and they had rules about not having women in rooms after seven at night and rules about not having cars on campus, and so forth. Well, I think that age has passed and I think it is probably quite fortunate that it is passed. And this kind of rule would strike me as a kind of archaic residuum of that period.

* * *

Direct Examination of Larry J. Krafft.

Q. Dr. Krafft, would you state for the Court your name and (31) address?

A. My name is Larry John Krafft. I reside at 10 Harvard Drive, Media, Pennsylvania.

Q. And you are a professor at the University— at Temple University, is that correct?

A. Yes, it is.

Q. And what is your present position?

A. I am presently Professor in the Department of Psychological Studies in Education and the Program of Psychoeducational Processes.

Q. And I direct your attention to Plaintiffs' Exhibit P-41 which I bring up here with the assistance of my associate and would you tell me whether or not the materials set forth in there is, to the best of your knowledge, correct?

THE COURT: Is that the same as Exhibit—

MR. REATH: It is E, your Honor, in the pre-trial memorandum.

THE COURT: 41?

THE WITNESS: Yes, it is.

THE COURT: It is 41.

MR. REATH: Your Honor, I move into evidence Plaintiff's Exhibit 41.

THE COURT: Any objection?

(32) MR. SILVER: Is that the curriculum vitae?

THE COURT: The curriculum vitae.

MR. SILVER: Prepared by this witness?

THE COURT: Yes.

MR. SILVER: No objection.

THE COURT: Received. I assume it was prepared by the witness.

THE WITNESS: Yes, sir.

(PLAINTIFFS' EXHIBIT 41 WAS RECEIVED)

BY MR. REATH:

Q. Now, Dr. Krafft, would you please just give us a very quick overview of your education, your post graduate education, your educational experiences that bring us up to date, keeping in mind that the Court will have the benefit to read all that. But just the

highlights, if you will. First, let's begin, where did you get your under graduate degree?

A. My under graduate degree is from Concordia College in Wake Forest, Illinois, a Bachelor of Science in Education and Psychology.

Q. And then—

A. Subsequently I received a masters degree from Michigan State University.

(33) Q. In what subject?

A. In Education and Sociology. And after that I received my Doctor of Philosophy Degree from Michigan State University, and that is in Educational Administration and Psychology.

Q. And what was your dissertation on?

A. My dissertation was on the topic of small group—small groups seminar instructors at the secondary level.

Q. Okay. And following the securing of your doctorate tell us briefly your employment experience, where you were employed, what you did in various institutions?

A. Well, I was employed subsequent to my under graduate degree as a teacher and subsequently as a principal in elementary schools. After my doctoral degree I did take an appointment at Temple University which is a little more than nineteen years ago, and have had a variety of experience through this time period. Would you like me to try to catalogue some of those?

Q. If you would, merely just sort of group them together in terms of what you have done, particularly in reference to the topic of educational services.

A. Well, I have worked as an instructor, of course, at the university in courses particularly that relate to the study of groups, group dynamics, the leadership—the social side of leadership in groups and organizations, (34) whether that is in classroom settings, whether that is in various kind of public and private sectors. I have worked, for example, in situations where street gangs and police and where it was—where the situation was like boards of education and schools in school districts, or some times various teams and unions within business and industry. I have worked in the United States and in many foreign countries in these various capacities, especially and most often in

what I would call the, in my sense, the educational arena in terms of working and developing human resources which, to me, is the process of education.

Q. With the permission of your Honor, if I may lead in this respect, consultant to educational managers in higher education and government.

A. That's correct.

Q. Would you identify what that was?

A. Well, it has been in a number of situations domestically here. Right now and in recent years I have been doing much of that in foreign countries, as well. Currently I have been consulting to and developing training programs and training institutes in different countries as, for example, in Indonesia in which the effort is to expand their understanding and skills and strategies in regard to what I would call the empowerment of (35) students in relationship to being able to release the control of the system so that students have a great opportunity to partake of a broader range of learnings.

Now, the vested interest on the part of these systems in trying to accomplish that is to—is due to the recognition that education in our old, tradition sense is highly restrictive. That is the more we some times learn about things like mathematics and sociology to the exclusion of other kinds of learnings rather than some times making people more educated in some ways, as we know, they become a little bit less educated or not as educated as those who are not in schooling. So it is trying to create a context in which a broader range of educational opportunities is available to the student clientale.

Q. Now, I am going to try to save a little bit of time because you were here when I questioned Dr. Morris.

A. Yes, sir, I was.

Q. And did you pay attention to that part of the testimony where he read from and identified the statement by President O'Leary at Albany?

A. Yes, I did.

Q. In terms of the educational mission and Dr. O'Leary's view of the role of the university in fulfilling the educational process?

(36) A. Yes.

Q. Now, in addition to what was read to you, what was read to Dr. Morris, I want to read to you two very short portions that come from a volume issued by the State University College at Cortland, P-26, and I am reading, your Honor, from three very short portions of P-26. The first from the introduction, which states, "the primary objective of the college at Cortland is to provide the necessary human and physical resources for the complete education of its students. This commitment to the education of the whole person includes educational experiences in and out of the classroom which facilitate intellectual, emotional, social and physical development, clarification and critical assessment of personal values, effectiveness in interpersonal relationships, understanding and participation in the democratic process, social responsibility and preparation for personally satisfying careers."

You are famliar with that and I believe you have seen that before?

A. Yes, I have.

Q. Secondly, I want to direct your attention to the preamble to that portion designated "Declaration of Rights and Freedoms," and I may skip slightly because you have had the full text, and the full text is before (37) the Court. "Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of the student and the general wellbeing of society. Students have become increasingly aware that learning is a broad process whose boundaries extend beyond the classroom and encompass all aspects of their lives." And then skipping a little bit, "achievement of the established goal of this University, to learn, to search, to serve, can come only with the acknowledgement of the continuing need for learning among all members of the community and the realization that a sense of community is imperative for the creation of an atmosphere for individual growth." And then finally I want to read to you from page 10 of the College Housing Policy, again from the Cortland P-26. "The State University College at Cortland considers the residence hall experience to be an important aspect of the educational experience. Therefore, it is the policy of the college that all freshmen," etc. must enroll for at least, I think, one or two years, whatever it may be. Now—

MR. SILVER: Your Honor, in accordance with the Rules of Evidence, Rule l(a)(6) specifically I would ask Mr. Reath to read one paragraph that follows for purposes of completeness or, (38) if it would be easier, I will read it.

MR. REATH: Go ahead.

MR. SILVER: It is on page 3 in the preamble. "It is impossible to separate the concept of student freedom and rights from the concept of student responsibility. Consistent—"

THE COURT: Coincidental.

MR. SILVER: "Coincidental with any rights are corresponding responsibilities. Developed from this document and internalized within student social codes and constitutions will be the specific applications of the rights and responsibilities stated herein. These responsibilities will be meaningful to students only with full cooperation and communication among all segments of this academic community. To this end, it is imperative that students desiring respect for their rights must then accord to the other segments of the community the same respect. It is only logical that student responsibility can be the best deterrent to student irresponsibility. Hopefully then this document will be viewed not as one which gives freedom but rather as one which illustrates the willingness of students to accept a good measure of responsibility for their own actions. This document recognizes all legal responsibilities mandated to the College and its members. (39) It is meant to be operable within the context of existing laws governing the college and its community." Thank you, your Honor.

THE COURT: All right.

BY MR. REATH:

Q. Now, having read to you the statement of philosophy and educational mission, would you state to his Honor your view as to—your view with respect to the way that has been stated.

MR. SILVER: Objection, your Honor.

THE COURT: What is the basis of the objection?

MR. SILVER: Mr. Reath referred to the President's statement, the statement of the preamble statement in the introduction. I don't know what he's referring to.

THE COURT: Sustained.

MR. REATH: I guess we have to take them one by one.

BY MR. REATH:

Q. Let's take first Dr. O'Leary's statement. And would you state for his Honor your view as to whether that is a proper statement of a college mission in fulfilling its educational mission.

MR. SILVER: Objection, your Honor, (40) on relevance grounds as to whether this witness' conception of a university mission comports with that of President O'Leary.

THE COURT: Well, no, I will allow it. But it is understood, of course, that this is his conception, not that of President O'Leary.

MR. REATH: And it is background for—

THE COURT: You are asking him, I think, whether or not he generally agrees with the principle set forth there? Do you have any quarrel with it?

THE WITNESS: No, sir. As a matter of fact, I think it is a rather, as well as I understand it, good statement in relationship to acknowledging the comprehensive mission of a university.

THE COURT: All right. Everybody agrees with that.

MR. REATH: I think so.

BY MR. REATH:

Q. And would your answer be the same with respect to the other portions of the Code of Student Rights and Responsibilities that I just read to you from Cortland?

A. In regard to the statement—

Q. About the role of the educational mission—

(41) A. Comprehensive role, yes, the educational mission of the university, yes?

Q. Now, you are familiar from the questions that I asked Dr. Morris about the university rule which prohibits students from using the privacy of their dorm room to invite a third party invitee to come and speak on any topic if that invitee is receiving money or is being paid for his or her services, correct?

A. Yes.

Q. Now, would you state to his Honor your view as to whether that kind of a regulation is reasonable or necessary to carry out the policy that has been described and with which you have stated you agree?

MR. SILVER: Your Honor, I am going to object on qualifications of this witness to testify to that subject.

THE COURT: No, within the parameters of his educational experience and background I will allow him to testify. Again, that goes to the weight of his testimony, what his experience is. And I already heard about it.

MR. SILVER: Thank you, your Honor.

THE COURT: All right.

A. From my perspective it is encumbant upon the university to, number one, uphold and support what I see as a (42) primary mission of the university, and that is in every way possible to enhance the experiential educational opportunities that its students may have. That includes what I would call a very broad range of possible activities, as opposed to proscribing students' activities in relationship to what they may or may not engage in within their residences. I view the residences as a place where a student lives. I view the residence as a place where the student, as a collectivity, as well as individual, should be encouraged to control their environment as much as possible and from—and in that spirit I think I would agree with the additional reading that counsel added to Mr. Reath's earlier reading, that students, in the spirit of cooperation, in the spirit of controlling their environment in a mutual way does not mean just simply doing their own thing. And that is part of that learning process.

So, for example, in earlier testimony this morning I heard a question to the effect of can a student simply do their own thing if one of them doesn't want to. And from my point of view that is an important issue. And that is an issue that they should work at and work out among themselves as opposed to having the university administration coming down and saying yes (43) you may or no you may not. That is limiting, number one, the educational opportunity of the student. The second is the perspective on the student as a person who is a human being, maturing, and needing to learn, needing to negotiate, needing to have the opportunity to resolve those kinds of issues. I am also concerned about the result in the sense of whether or not as a result of those discussions amongst students if they disagree, they allow AFS or anyone else in that particular instance to come in. But that is far different from from having the university proscribe it as far as I am concerned.

Q. Okay. Thank you. Now, an additional argument that has been cited as a justification for this ban by Dr. Hostetter has been that the university believes it has a duty to protect the students from unethical, entrepreneurs. In that connection I read to you from page 132 of Dr. Hostetter's testimony where he was questioned. Would you agree, I will ask you, do you feel that you, the State University, have a duty to protect students from unethical entrepreneurs? Yes. "And the way you do it is just to ban everything?" "Yes." "Question: If the university does not sponsor or authorize commercial invitees to come on campus how can you be charged with responsibility for vouching for their (44) integrity?" "Answer: I am not sure I know how to answer the question. If there is a ban there is no need to evaluate." "Question: And that is the way you deal with the subject?" "Answer: Yes."

Now, will you state to his Honor whether in your view a total ban such as has been described there where one of the purposes is to protect the students from what is alleged was claimed to be unethical entrepreneurs, in your view is that a valid and proper role for the university and does that, in your view, foster or advance its responsibility for the educational mission?

MR. SILVER: Objection, your Honor. What was voiced here in the deposition is an administrative concern. This witness has not testified to any administrative experience that would qualify him to speak to that perspective.

THE COURT: Well, I will sustain it on the basis that you are partially right. But also the question was a compound one. You asked him to assume one as an administrator and assume another as within his field of expertise.

BY MR. REATH:

Q. Limiting the scope of the question to your expertise, not as an administrator, but as one expert in education (45) and the development of the whole person, will you state whether in your view an effort to protect students from unethical entrepreneurs constitutes an appropriate role for the university to play?

A. I consider it totally inappropriate for the university to do that. And, one, I think it is quite unenforceable. But that's not my real reason. I could even build somethings that I know about what goes on in universities. Some of us might agree that some professors are quite unethical in terms of how they proceed in handling their in course activities. But that's not a concern in the dormitory or for professors in classrooms, as far as I am concerned. Because here is a context in which there are groups of students together and where they together listen to a presentation and they make evaluations and they have an opportunity to come with different, in a way, mind sets, different set of perspectives, raise issues in this context by which they could determine what is and is not ethical from their point of view. If, indeed, something "unethical" would happen based on their determination I have no doubt that even if after presentations like this that would be quickly identified and that kind of news would travel very quickly around the campus like this.

Secondly, I would be concerned that (46) if that kind of activity is proscribed on the basis that something might be unethical it again assumes that the student is somehow needing to be protected and is somehow less adequate, less capable, somehow stupid. It is curious to me that outside of the university environment they are not treated that way. That their colleagues who are

not in the university are not treated that way at the same age. That within their parental homes or where ever they come from they are—they have those kind of opportunities to invite in whom they wish, that they can more easily be persuaded to purchase something and have something quite unethical happen to them if, indeed, they don't have this kind of a forum, this kind of an opportunity in which to interchange their perspectives, ideas, what is ethical, who is getting took, all of those kind of possibilities. And I'd say they are more safe from having that happen to them in this environment than just about any other environment I could imagine.

Q. Okay. Now, you are familiar with an AFS demonstration?

A. Yes, sir.

Q. And you had seen the sample demonstration, the tape which has been—which was used originally in Penn State and you say it there and you have seen it—seen the same one used in this case?

(47) A. Yeah.

Q. Now, based upon your expertise as an educator and as one who has specialized particularly in the value of group interaction, will you state to his Honor what you as a professional observe from seeing that exhibit and identify for the Court what values to the student that would flow from participating in that kind of a demstration.

MR. SILVER: Your Honor, I believe this would be only for the record, but I object on the grounds that the truth or falsity or what AFS does is not an issue. I think it is clear from the Court's ruling and I think thorefore the educational value of what AFS does is not an issue. In fact, in view of the fact that the state has a total ban on commercial activity it may be arguable that everything that is unique about AFS' demonstration itself is not particularly pertinent here. But with respect to that question specifically I think the value or truth or falsity of what is being done is not an issue before this Court in light of the state's total ban.

THE COURT: He is not asking—

MR. REATH: I am not—

MR. SILVER: I understand that. But I think along those same lines whether or not it has (48) educational value is not relevant any more so than whether or not it is fraudulent or misleading. I mean, I view educational value as one benefit that might be derived from one of these demonstrations. I think that we have been instructed by the Court that we are not to establish that perhaps unethical conduct is being practiced here or misleading conduct. And I think along the same lines it only makes sense that if there is any value to this particular speech that is not an issue that the Court has deemed relevant to the action.

THE COURT: Well, in determining, though, which is an issue, whether or not the regulation imposed by the state is necessary or is proper in a case such as this, don't I have to determine, isn't it a question if it has educational value or not, isn't that would up in those questions?

MR. SILVER: I think not, your Honor, because to do so makes this action only involving what AFS is all about. And our whole point or the state's perspective is there very well may be a multitude of educational, honest, valuable entrepreneurs who want access to the campus. We will not discriminate against who is good and who is bad. We have banned everybody. We will concede that not every entrepreneur is fraudulent has fraudulent practices. And we will concede that not (49) every entrepreneur has uneducational presentations. That is not what this case is about. This case is about whether or not we can keep everybody out and whether this particular entrepreneur has an educational presentation I think is not at all relevant.

THE COURT: Yes, but in determining whether or not you can keep everybody out the court has to decide whether or not there is an interest, justifiable interest in the regulation that the state can take a position on. It is one of the tests I have to determine. And this would be of some significance, I would think, whether or not this type of presentation, certainly if it is educational in value then

in and of itself that wouldn't indicate that the state would have a compelling interest or any type of interest in eliminating it. I can't imagine it would.

MR. SILVER: I disagree with that, your Honor, because, again, this case is not about whether or not we have to let one entrepreneur on. The case is about whether or not we have to let everybody on.

THE COURT: I am not talking about this one entrepreneur, either. He's telling me about this particular type of presentation, whether or not in his opinion it has educational value. No, I am going to receive it.

BY MR. REATH:

(50) Q. Do you understand the question?

A. I will review my understanding of the question before I answer it. Is that all right?

Q. All right.

A. My understanding is that you are asking me what kind of educational value there is in having students invite and participate in the presentation such as that by AFS.

Q. In the privacy of their dorm room.

MR. SILVER: Again, your Honor, I need to object. This particular entrepreneur wants to go into the dormitories. The ban at issue prohibits all commercial activity on campus.

THE COURT: I know. But somebody should have addressed themselves to that long ago. This is the first time that has been brought up. We have had all sorts of testimony. Everybody here has been talking about residences. In fact, your very stipulation number nine, prohibit from inviting into their dormitory room commercial enterprises which furnishes information, etc. As I read the regulation it is much broader than that. But you frame the issues here. No, I will overrule your objection.

MR. SILVER: Thank you, Judge.

BY MR. REATH:

(51) Q. If you will, please, please give your answer.

A. I define a number of different level of benefits by participating in a session like this by a student in this context. I see, first of all, in a very broad sense, I can wax philosophical, it is easy for a professor to do, but this is part of what we might call the pursuit of truth and knowledge. But I will be—try to be very specific about that. Number one, in regard to an education about the product, students can, and I have observed through the presentation, I learned some things about quality of that kind of material, pots and pans, and so on. I learned a little about nutrition, although I will admit not much. I learned a little about or I observed—yes, I did learn something else about conservation of energy in relationship to how they utilized that. Those I consider finite, tangible kinds of learning that may result by participating and listening to a presentation like this. More important than that and what I call next stage is in terms of a personal kind of learning opportunity. That is, do I chose to go to a thing like this or not. And what are my motivations in doing it. I do attend, I chose to attend, and I can observe many different kinds of things going on. One is I can observe this group in interaction. Now, I am a specialist in analysis of groups and how do you intervene (52) to make them more effective and things like that. That is a kind of observation of social interaction. I can observe the kind of questions that others ask about this product and about this prosentation or challenges that they give that I might not have thought of and the next time, even if I go out to the store, I might think to ask about those kind of things. How long has the company been in business? I as a young student have never thought about that issue in terms of thinking long-term. If I were to decide to buy a product like this what are the short term advantages and consequences and what are the long-term benefits and how do I balance that? What is it going to cost or what might it cost me in the future if I defer a choice, you know, to make a purchase like this. There are lots of different kind of what I would call consumer issues and choices that I can be confronted with and learn from not just by doing it myself by hearing others doing it with me as opposed to being in the classroom as opposed to doing those other activities totally outside the confines of what

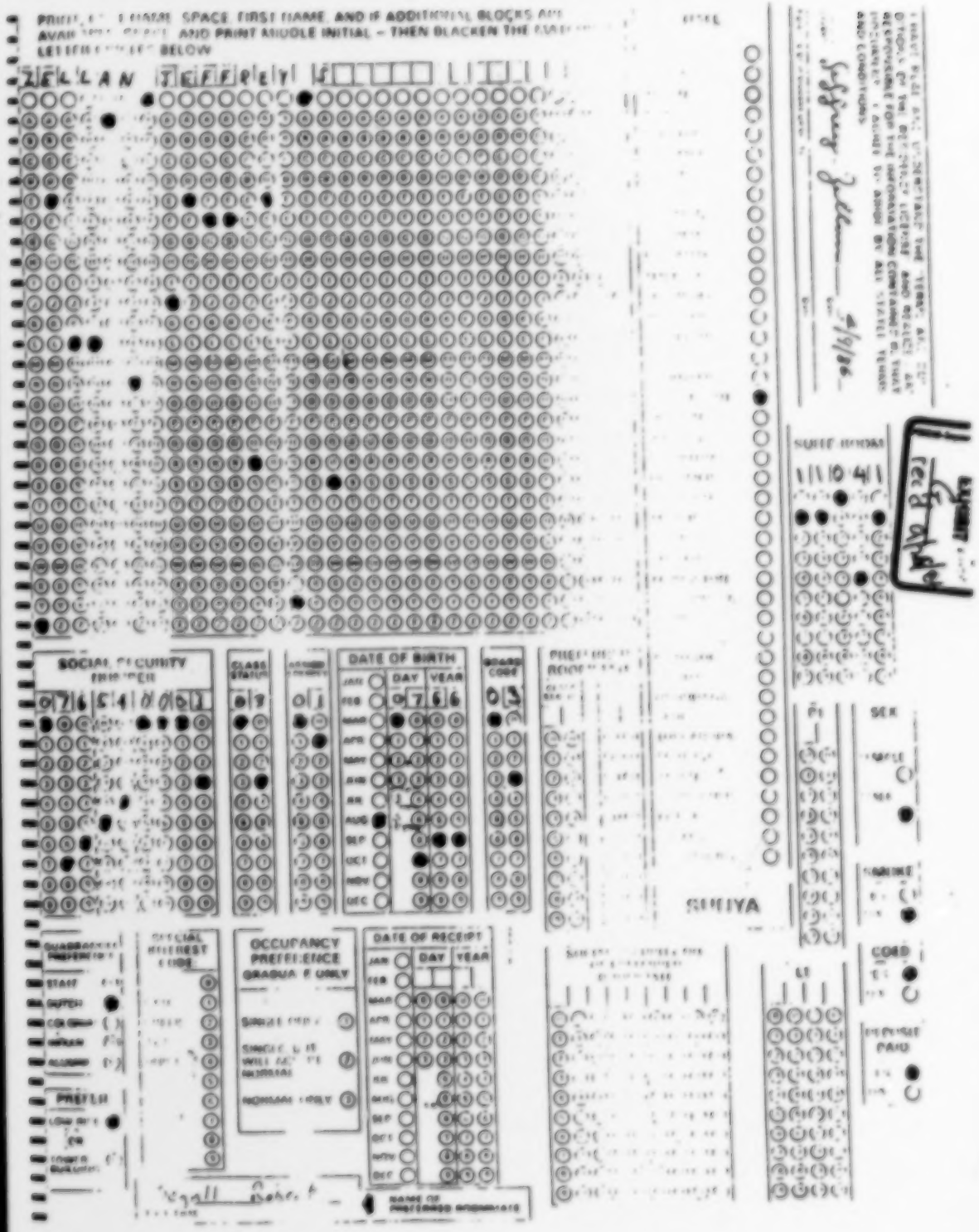
we call sometimes in a strict sense of the word classroom learning. There is within that also the issue of budgeting, the issue if I were to chose to purchase how do I finance and go all through all of that and to learn about that stuff. There is a kind of a learning (53) about those sorts of commercial presentations because it is, in a sense, real life. And I might want to learn the salesman's strategy and observe that. Why not? I might want to learn how that salesperson influences the rest of the group. And why not? And in that situation also how the perspectives of different people come into play.

Now, in that kind of a setting I'd say there is more opportunity to have that kind of thing happen than just about any where that I could imagine. Now, in regard to making specific choices, and my understanding is in relationship to this particular product if I were to chose to purchase it I understand that I would have a chance to go back on my decision within a certain period of time. So there is another protection in that. And the group dynamics plays a part in that because somebody might convince me to change my mind. That stuff doesn't happen so easily when I am not in that environment. But beyond that, why in the world would a university keep me from having that opportunity to choose?

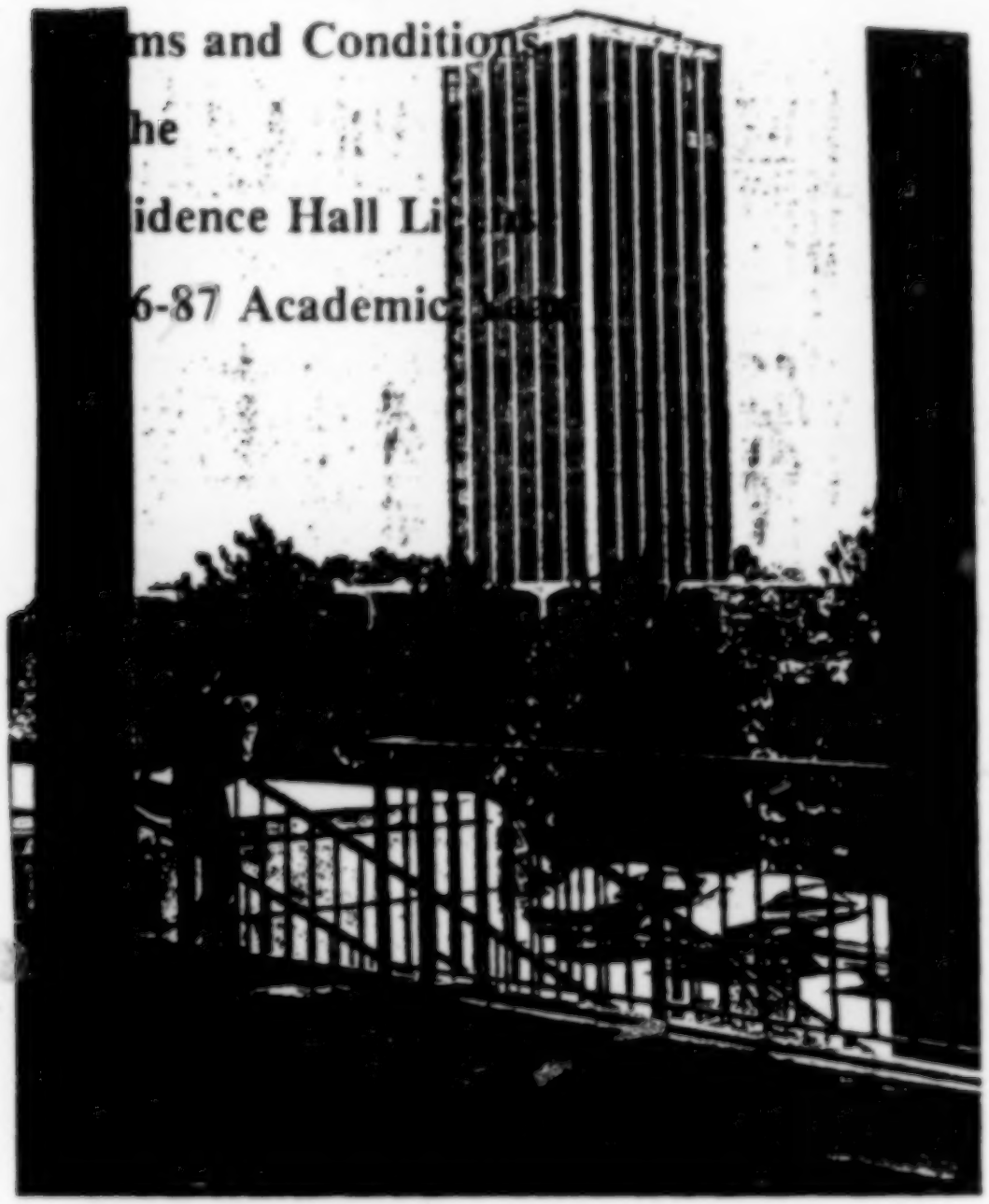
Another point is so if there were many, many different kinds of presentations like that in my environment it is part of our learning to live as a community and choosing to exclude them for myself or not (54) participate in them or to negotiate with my suitemates or whoever else is living in there about that kind of excess. But that is part of, again, the world of living and learning together. And taking that kind of responsibility rather than have big daddy university administration tell me what I can or cannot do, proscribing my activities.

* * *

Defendants' Exhibit G—Application for Housing.



Defendants' Exhibit H—Terms and Conditions of the Residence Hall License.



State University of New York at Albany

State University of New York at Albany Terms and Conditions of the Residence Hall License 1986-87 Academic Year

YOU ARE RESPONSIBLE FOR READING THIS INFORMATION....YOUR SIGNATURE ON YOUR ROOM REQUEST FORM INDICATES THAT YOU AGREE TO ABIDE BY THESE TERMS AND CONDITIONS.
(This license is binding for the full academic year unless conditions in "A" are met.)

The University believes that the achievement of individual and corporate responsibility is a vital part of the total educational experience. In residence halls, mutual respect for individual and group rights and privileges within an academic atmosphere is expected of, and encouraged in, every student. The variety of educational opportunities available depends upon the interest and involvement of students. A staff of student Resident Assistants and professionally trained Residence Directors lives in residence and works with students, assisting with individual and group development.

Description of Residence Hall Accommodations

There are five residence quadrangles at The University at Albany. The following quadrangles are on the uptown campus: Indian, Dutch, State and Colonial. The Alumni Quadrangle is located on the downtown campus, approximately three miles from the uptown campus with regular bus service provided throughout the day and evening hours.

The uptown residence quadrangles offer four, five and six person suites containing either two or

three person bedrooms, in both tower buildings and low-rise (3 story) buildings. The suite accommodations consist of study areas and bedrooms. On the downtown quadrangle, students are housed primarily in two person rooms off main corridors. Each quadrangle contains dining facilities and public areas; lounge facilities are located within each residence hall.

A residence hall room is furnished by the University with one bed, mattress, dresser, desk chair per student, and one floor lamp and a mirror per room. Students are allowed to bring their own mattress pads, study lamps, irons, pillows, bedspreads, wastebasket, blankets, bookcase, tables and comfortable chairs. Linen must be furnished by the student. Mattress size is 33½ by 80 inches.

Terms and Conditions

A. Only those students who have completed a Room Request Form and have been assigned to rooms are permitted to reside in University Residence Halls. The Residence License, room and board, is binding for one academic year (fall and spring semesters) except for students leaving the University at the end of the fall semester, or enter residence for the spring semester only. The Residence License for undergraduate students consists of room and board and is available *ONLY* on a combined basis. Board is optional for graduate students living on the Alumni Quadrangle only.

B. Academic Year Room and Board Rates

1. **Room Rates** (telephone service not included)
Please see separate sheet for rates.
Increased occupancy will be in effect during the academic year. This means that the number of students assigned to a bedroom under normal conditions has been increased by one person. It is anticipated that a significant number of new, incoming students will be housed in increased occupancy situations. Examples of increased occupancy include three students assigned to a room normally housing two students, and four students assigned to a room normally housing three students. Limited single rooms are available for graduate students. Graduates may request singles and will be assigned on a first-come, first-served basis. Please indicate if a normal occupancy is acceptable if a single is not available.

The State University of New York reserves the right to adjust room rates should this be required.

2. **Board Rates**

Please see separate rate sheet.

03 20 meals/week, Breakfast-Lunch-Dinner
04 20 meals/week, Breakfast-Lunch-Dinner Kosher**
05 14 meals/week, Breakfast-Dinner
06 14 meals/week, Breakfast-Dinner Kosher**
07 14 meals/week, Lunch-Dinner-Sunday Brunch
08 14 meals/week, Lunch-Dinner-Sunday Brunch Kosher**
09 7 meals/week, Dinner ONLY
10 7 meals/week, Dinner ONLY Kosher**

***Lunch and dinner are the only kosher meals and are served in the Dutch Quadrangle Dining Hall.*

The University reserves the right to limit Kosher meal enrollment with no advance notice. Choice of a Kosher meal plan does not guarantee housing on the uptown residence quadrangles or to any specific building or quadrangle.

"Campus Center Option" will be available to students contracting for any Board Plan. The Campus Center Option may be purchased to provide lunch or dinner, but not both. A student contracting for the D or KD only plan may only purchase the Campus Center Option for Dinner. The Campus Center Option provides a way for contractees to pay additional money to University Auxiliary Services at Albany, Inc. to purchase food and beverages (excluding alcohol) in designated campus center food operations. Students living in the Residence Halls must purchase one of the regular board

plans in order to be eligible to participate in the Campus Center Option. Students may select this option at the time his/her permanent meal card picture is taken in the Food Service Contact Office. For futrher information and restrictions see separate sheet or contact University Auxiliary Services at Albany, Inc., Food Service Contact Office, State Quad. SUNY Albany, 1400 Washington Avenue, Albany, New York 12222.

The University Auxiliary Services at Albany, Inc. Board of Directors reserves the right to adjust board rates upon four week notice.

3. **Payment of Room and Board Charges**-Room and Board charges are normally included on invoices issued by the Collections Office and are due and payable prior to occupancy. Students are required to pay in full or provide evidence of financial assistance to the Collections Office to cover charges by the payment deadline. Students who have not preregistered for courses will be required to pay or provide evidence of financial assistance during course registration periods provided in the beginning of each semester.

Students who do not satisfy their financial obligations for room and board charges are subject to removal from residence halls and/or revocation of their meal card privileges.

C. Residence Rules and Regulations

The following regulations pertain specifically to residences. All expectations and regulations found in the publication, *Student Guidelines*, also pertain to resident students, but are not reproduced in the Residence License.

1. The University allows 24-hour visitation in the residence halls wherever residents approve. This should not be construed as approving or condoning co-habitation. Individual units must vote on their visitation policy within 30 days of opening. Approval of the policy must be by 2/3 majority. Sections of halls (a group of suites/rooms adjacent to a common lounge/corridor) may vote their own

separate visitation policy. Changes in the policy may be requested by residents at any time and may be made by 2/3 majority vote.

2. In order to provide the opportunity for educational experience in an academic sense, formal *quiet hours* within the residence halls have been established as 9:00 p.m. to 7:00 a.m. Formal *quiet hours* are defined as a time during which sound must be contained within room/suite so as not to disturb other individuals living in the hall or quadrangle. Hall meetings will decide if the formal *quiet hours* will apply seven nights a week or just on nights preceeding a day of classes. In addition, hall meetings may vote to expand *quiet hours* beyond the 9:00 p.m. to 7:00 a.m. required hours. Formal quiet hours on weekends (Friday and Saturday) are from 2:00 a.m. to 7:00 a.m. During Finals, beginning the night of the reading day, formal quiet hours are in effect 24 hours until the end of finals up to and including weekends. There should be general consideration of others 24 hours each day.

3. The privilege of using alcoholic beverages in residence halls within established guidelines is granted by the Univerity. The University Alcohol Policy is available upon request from the Residence Staff.

4. The following are specifically prohibited in and around University-operated residence hall and will be removed by staff.

a. television aerials, masts and other radio-transmitting or receiving equipment,

b. firearms, other weapons, firecrackers, explosives, dangerous chemicals, flammable liquids and items which constitute a fire hazard,

c. pets other than tropical fish,

d. waterbeds,

e. air conditione , and open-element or liquid fueled (Kerosene, Propane, Gas, etc.) space heaters,

f. refrigeration equipment (except refrigerators offered for lease through University Auxiliary Service approved vendor or units which students provide which must be registered with the

Department of Residential Life). Student provided units must fall within the following guidelines: good working condition, size (storage capacity) of 6 cubic feet or less, and electrical requirements and use rated at 110 volts, 1.75 amperes or below, and U.L. approved. Failure to register a student provided refrigerator will result in its removal by staff.

5. Storage of motorcycles or mopeds is not allowed within the residence halls.

6. Due to health, safety and sanitary conditions, only minimal snack preparation is permitted within students rooms or suites. Cooking is permitted only in residence hall kitchenette areas. For snack preparation students may possess only the following appliances:

a. pop-up toaster,
b. popcorn popper,
c. thermostatically controlled hot pot,
d. percolator-commercial coffee maker

All of the above must be U.L. approved.

ALL OTHER APPLIANCES (ESPECIALLY HOT PLATES AND OPEN ELEMENT APPLIANCES) ARE PROHIBITED, EXCEPT REFRIGERATORS AS SPECIFIED IN C.4 ABOVE.

Extension cords which are used by residents must be of at least a AWG 16 size, U.L. listed, and may not be longer than eight feet. Heavy duty extension cords are suggested. Appliances equipped with three wire plugs require a three wire grounded cord which is an AWG 16 size, U.L. listed, and no longer than eight feet.

Students who choose to store food or prepare snacks in their rooms or suites will be responsible for the cleanliness of these areas and will be held financially liable for any required extermination of pests, clean-up, or for damage caused by electrical appliances or their use.

7. Fire drills will be conducted in all residence halls in accordance with Section 807 of the New York State Education law. Every student must participate. Failure to cooperate in fire drills or building evacuations will result in disciplinary action. The causing of a false alarm, discharging of

a fire extinghisher, breaking or damaging exit lights and extinguisher boxes, alarm covers, heat/smoke sensors, and tampering with fire or safety equipment are serious offenses and will result in action being taken by on-campus and off-campus authorities. Residents are expected to participate in fire safety programs and become aware of the exit routes for the building. In addition hazardous trash accumulation should be prevented, bedroom smoke detectors should be checked periodically and corridor and stairwell fire/smoke doors should always be closed.

a. The use of lighted candles or other open flame devices in residence halls, rooms, lounges, etc. is prohibited.

b. The use of live trees or wreaths for holiday decoration is prohibited.

c. Only materials that have been certified as to their flame retardment will be allowed in Residence Hall rooms including, but not limited to, wall covering, wood, wood paneling.

8. Throwing or hanging anything out windows is prohibited. So too, is removal of existing screens. Recreational activity within the center portion of each quadrangle is governed by the Residence staff. Activities which could be injurious to facilities or grounds are prohibited in Residence Hall Common Areas.

9. Solicitations and sales by residents and others is only allowed as authorized by the designated campus authority.

10. Special Function Request Forms are required for any and all requests for space needed for activities (both formal and informal) and approved solicitations.

11. Overnight guests may be housed, provided the guest resides in a student suite/bedroom. For reasons of liability, the resident student host must inform quadrangle Residence staff prior to the stay in residence of a guest. A student host assumes responsibility for the behavior and activities of his/her guest. Guests are subject to the same regulations as their host and it is the responsibility of the host to inform his/her guest of these

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regulations in advance. The University reserves the right to require the immediate departure of any guest for situations in which University regulations or individual rights are being violated.

12. Individuals living in residence halls are expected to maintain respect for individual and group rights and responsibilities. These individual and group rights and responsibilities are stated in this License and the *Student Guidelines*. Failure to maintain this respect for roommates, suitemates, and other individuals and groups may result in disciplinary action.

13. For health and safety reasons, students are prohibited from entering the tunnel areas unless specific permission is granted by a Residence staff member.

D. Board Conditions

1. The University Auxiliary Services of the State University of New York at Albany has been granted the contract for food service in University dining facilities. A Food Service contact office is located in State Quad U-Lounge and is staffed to answer any questions regarding on-campus meal plans. The first meal served after a vacation, recess or beginning of the semester is breakfast on the day following the opening of the residence halls.

2. Students are permitted to eat in any of the contract dining halls.

3. No food or Food Service equipment may be removed from the dining halls except in the case of approved sick trays.

4. Presentation of the meal card is required for admittance to dining hall. All new students may have their pictures taken for permanent meal cards during Summer Orientation. A student who has been photographed for the meal card before the fall semester begins may obtain the meal card at Residence Hall check-in.

5. Meal cards which are mutilated or lost will be replaced by the Food Service Office at a charge of $5.00 payable at the time the new meal card is processed. A temporary card will be issued at no charge until the new one is received. If the temporary meal card is not returned at the

appropriate time, there will be one additional charge of $5.00. For meal cards temporarily misplaced, students may request a temporary meal card for a maximum of 10 days with a deposit of $5.00. Failure to surrender the temporary meal card after 10 days will result in forfeiture of the deposit.

6. The meal card is not transferable, nor are the meals, or any part of the meals obtained by the use of the card, whether in the contracting student's absence or presence. Meal cards illegally used may be confiscated without refund or proration to the owner and students involved referred to the appropriate governing body.

7. Special weekend meal passes for non-resident students may be obtained at the Food Service contact office. The weekend meal pess entitles the guest to any four weekend meals.

8. Students may change their board plan for the fall and spring semesters only during the academic Drop/Add period at the beginning of each semester.

9. Students who have not had pictures taken prior to their arrival on campus should report to the Food Service Office immediately. Failure to procure a meal card will **not** release students from their license obligations, and they will not be permitted to eat until they have had their picture taken.

10. Contract food service is not available during periods when the University is not scheduled to be in session for any reason.

E. Maintenance and Condition of Residence Facilities

1. The University is not responsible for loss of or damage to personal property of occupants. Students are urged to provide for the security of their own belongings by locking their rooms and by carrying personal property insurance.

2. Regular maintenance may be scheduled in residence rooms, suite and building common areas during the academic year while these facilities are occupied. Painting may be scheduled in these areas, with prior notification of 10 days given, when possible, to students thus effected.

3. Rooms and suites are painted on a scheduled basis. Where room condition warrants, students may request permission through their Quadrangle Residence staff to paint room or suite areas themselves. Once approval is granted, the room may be painted with University supplied paint.

4. Any proposed enhancements, including lofts and panelling, to student rooms or living areas must conform to all applicable fire and safety codes and must be approved through the Department of Residential Life in advance. Any materials used must be certified as to their flame retardment.

5. The University reserves the right to inspect rooms for safety, security, and maintenance purposes. In all instances where the health, safety and welfare of a student or University property may be in danger, a Residence staff member has the right to enter a room or suite immediately. In the interests of health, safety and maintenance of University property, announced safety inspections will occur once each semester. Residence staff will provide procedures for such inspections in hall information and section meetings.

6. Any repair work to be done in student rooms that is scheduled in advance and will occur during university recesses will be communicated to students prior to their leaving campus, except for emergency repairs.

7. Damages and Losses

a. Each student living in residence is responsible for any damage or loss to his/her assigned room and/or suite, including its condition (reasonable cleanliness), and damage to or loss of furniture, fixtures, equipment and effects contained therein, and for damage or loss caused by him/her to any other part of the residence hall. The use of such materials as tape, paint, paste, glue, nails, tacks and screws on walls, furniture, and woodwork (including inside and outside doors) is prohibited; pictures, bulletin boards, and decorations are to be hung from the picture molding with picture hooks, or from the tack strip with thumbtacks.

b. Students responsible for losses or damage in residence will be billed by the Department of

Residential Life. Charges will reflect actual cost of repair plus administrative costs ($4.00 per bill). There is a $1.00 minimum repair charge, per student, for any damage billing. An itemized list of damages most commonly billed and the cost of these damages is available for review upon request from the Department of Residential Life. All repair work done must be accomplished by the University personnel or their designees. If payment is not made, a hold will be placed on all of the student's University records, and future on-campus housing will not be available for him/her.

Whenever possible, damages shall be repaired within one year or action taken to repair the damage by that time. In case of billing for room painting, stick-um removal, bedroom furniture, and broken windows at the end of an academic year the work will be completed within three months of the bill. If the student billed believes action has not been taken, a request for a refund may be submitted to the Associate Director of Residential Life.

c. Where two or more students occupy the same room or suite, and it cannot be ascertained which student(s) is responsible for the damage or condition of the suite or room, an assessment will be made against both or all equally.

d. Any claim by any person that the University is liable for damage to personal property in a residence hall must be filed in accordance with the State Small Claims Procedure with the Court of Claims. Students may obtain information from the Assistant Vice President for Residential Life & Student Development.

e. Furniture must be left in the rooms and lounges to which it has been assigned. Students who move furniture from designated areas will be billed for the removal of this furniture from their rooms. All students assigned to the rooms will be equally billed for the cost of furniture removal. There is a $5.00 minimum charge, per student, for the removal of furniture.

f. If a student loses a residence hall key during the course of his/her tenure in residence, he/she can only have it replaced by reporting to the Department of Residential Life, providing proper

identification by means of a student identification card, requesting replacement and paying for the cost of rekeying the door by check, money order, or cash.

F. Services and Facilities Available on the Residence Quadrangles

1. **Laundry Facilities**—Each residence hall is equipped with coin-operated washing machines and dryers. All washing machines operate on a cold water wash cycle only.

2. **Room Cleaning** — It is the responsibility of each student to keep his/her room clean. The University Maintenance Staff cleans hall lounges, stairways, lobbies and all student bath and toilet facilities. When possible rooms are cleaned and floors waxed during the winter recess period.

3. **Refrigerator Rental** — University Auxiliary Services has a contract with a vendor who leases refrigerators to students at the beginning of the academic year (see C.4.g. above).

4. **Food Vending Service** — is available at central locations on each residence quadrangle.

5. **Telephone Service** — is located in each room or suite of rooms, depending on physical layout of halls. The system is similar to that of home telephone service and is optional. Students are billed by room or suite each month for phone charges and are responsible for paying their own telephone bills. Telephone service is contracted directly with the New York Telephone Company and various long distance carriers.

6. **Postal Service** — coin operated postal services are located on the first floor of the Campus Center and are available when the Campus Center is open. All students must submit a forwarding address card to the University Post Office to have mail forwarded.

G. Application Procedures

1. In order for an application to be processed and an assignment made, all of the items listed below must be received by the Department of Residential Life.

a. Room Request Form with the parent's signature affixed if the student is under 18 years of age.

b. Advance Rental Deposit Form.

c. $50 Advance Rental Deposit in the form of a check or money order payable to the State University of New York at Albany. **CASH WILL NOT BE ACCEPTED!** This deposit is applied toward your first semester room charge. **NOTE TO NEW STUDENTS:** This deposit is in addition to the $150 Admission Deposit that you may have paid.

2. All materials should be mailed to:
Department of Residential Life & Housing
State University of New York at Albany
1400 Washington Avenue
Albany, New York 12222

H. Assignment Policies

All students may apply to reside in University residence halls or may live off campus in non-University facilities. No student is required to live on campus nor is the University required to house all students. All students must reside in their assigned rooms. The University reserves the right to increase the occupancy of a room beyond its normal occupancy at a reduction in room costs for all students concerned. This will be done in recognition of the University's commitment to a philosophy of providing an educational opportunity to as many qualified students as possible. Increased occupancy rooms in all residence halls may include bunked beds. Students assigned to these rooms select beds on a first-come first-served basis. If a housing shortage develops, full-time students will be given assignment priority over part-time students. Students who drop courses and or become part-time students still retain obligation to honor this License agreement.

Should it be necessary to increase the occupancy of any room, students will be notified of this action prior to their arrival for the fall term, provided there is sufficient time to effect such notification.

Just as the University reserves the right to increase the occupancy of student rooms in order to

accommodate more students, it similarly reserves the right to change the occupancy of an increased room to normal occupancy at any time. See Section M.4. on refunds for more information.

The University reserves the right to fill any vacancy or make any room assignment or reassignment it deems necessary. This administrative action may be recommended by Residence staff members with the approval of the Assistant Vice President for Residential Life &

1. **Continuing Student Housing Policy**

All continuing students including graduates may sign up for housing for the coming academic year during the spring semester based on priorities and group size. Complete information concerning the procedure for continuing student housing sign-up is made available on the residence quadrangles and in the Department of Residential Life. Continuing students who do not follow and complete this procedure for sign-up will be housed after new students are assigned, on a space available basis.

2. **New Student Housing Policy: First Year Students, Transfers and Readmitted Students**

Only those students who have completed a Room Request Form and have been assigned to rooms are permitted to reside in University Residence Halls. The Residence License, room and board, is binding for one academic year (fall and spring semesters) except for students who leave the university at the end of fall semester, or enter residence for the spring semester only. The Residence License for Undergraduate students consists of room and board and is available only on a combined basis. Board is optional for graduate students living on the Alumni Quadrangle only.

All new students will have the opportunity to state certain preferences. Preferences for specific roommates (which must be indicated by both individuals involved), co-educational housing, special interest housing, or non-smoking roommates will be honored where possible, but are not guaranteed. Students indicating no preference will be assigned to any available space. Residence

space is limited and, therefore, it is suggested that applications be returned as soon as possible.

3. **Visiting and Special Student Housing Policy**

Visiting, special, Continuing Studies, and non-SUNYA students will be considered for housing only if space is available after all regular matriculating SUNYA students who have applied for housing by opening day have been housed.

4. **New Graduate Student Housing Policy**

Graduate room assignments will be made on a first-come, first-served basis upon receipt of the completed application packet. Individual preferences, including single room requests noted on the Room Request Form, will be honored when possible. If a vacancy occurs in a double occupancy room, one of the following will occur based upon existing campus occupancy situation:

a. a new roommate will be assigned (every attempt will be made to provide a graduate student).

b. the remaining student will be reassigned to another double occupancy room.

c. the remaining student will remain in the room at the single occupancy rate.

5. As assignments are made, residents will be notified by mail. If a student cannot be accommodated, he/she will be placed on a waiting list for housing and will be notified of this status. Students who have submitted a Room Request Form, Advance Rental Deposit Form, and a check or money order for the $50 Advance Rental Deposit, and who do not receive a housing assignment by August 20, 1986, should notify the Department of Residential Life, SUNYA, 1400 Washington Avenue, Albany, New York 12222. The telephone number is 518-442-5875.

6. **Room Changes:** From the time of assignment through the second week of the semester, no room/suite or roommate/suitemate changes will be allowed.

i. **Cancellation of Residence Application**

The residence license becomes effective on the first day residence halls open for the fall semester.

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Sunday, August 31, 1986; and for the spring semester, Sunday, January 18, 1987, for those beginning school for the spring semester.

Students may cancel their application for housing at any time prior to August 31, 1986, for the fall semester and January 18, 1987, for the spring semester for those students entering residence halls for the first time. The $50 Advance Rental Deposit will be forfeited except under the following circumstances:

1. Students who apply in **WRITING** for a refund before May 15, 1986, for the fall semester, or January 1, 1987, for the spring semester will have the $50 Advance Rental Deposit refunded in full.

2. Students who apply in **WRITING** for a refund after May 15, 1986, for the fall semester, or January 1, 1987, for the spring semester will have the $50 Advance Rental Deposit refunded *only* if the student has withdrawn from the University for reasons beyond his her control or applied for cancellation of the residence application due to circumstances beyond his her control. These circumstances must be substantiated.

3. Students who apply in **WRITING** for a refund after May 15, 1986, for the fall semester, or January 1, 1987, for the spring semester but prior to entering residence, who have prepaid room and board, will be refunded the room and board payments, less the $50 Advance Rental Deposit.

4. New students who apply for housing after May 15, 1986 will have the $50 Advance Rental Deposit refunded if they apply in **WRITING** within thirty days of the date of receipt of their application by the Department of Residental Life, but before residence halls officially open. **NOTE:** Failure to cancel the residence license application in **WRITING** prior to August 31, 1986, or January 18, 1987, will result in a one quarter (8 week) room charge.

J. Arrival Procedures

1. Students entering residence halls for the fall semester, 1986, may move in between 9 a.m. and 5 p.m., August 31st, September 1st and 2nd. Students entering residence for the spring semester 1987, may move in January 18th between noon and 5

p.m. and January 19th between 9 a.m. and 5 p.m. Any questions about arrival may be directed to the Department of Residential Life at the above address.

2. Upon arrival, all students are requested to report to a central location on the quadrangle to which they have been assigned.

3. Room keys, front door keys, and mailbox keys are issued on the date of arrival. Students will also receive their meal cards at this time. In addition, each student will be required to complete a Room Condition Report Form describing the condition of the room and furnishings at the time of check in. Only students assigned officially to a particular room or suite may reside in that room or suite.

4. **Please note:** Rooms will be held for assigned students through the third day of classes only unless prior arrangements are made with the Department of Residential Life. Students who have not checked in by that time may have their rooms reassigned to other students.

K. Vacation Periods

During periods when the University is in recess, students other than International and Graduate students living in the International House or the Graduate Residence Hall must vacate their rooms. When the vacation or holiday begins after the last class or exam, students must be out of their halls no later than two hours after their last class or examination. The residence halls close two hours after the last class or examination and all students must leave their residence hall unless an exception is approved by the Area Coordinator. If rooms are not used by the University, personal effects may be left in student rooms during vacation periods, but only at the risk of the student. Under special circumstances, students may obtain approval from their Area Coordinator to stay in the residence hall designated for use when halls are not officially open. Students will be required to pay a ten dollar, refundable key deposit in the form of a check or money order. These students must reside in a room designated by the University for use during these periods.

L. Release from Residence License

1. The Residence License is binding for the academic year. Requests for release from the Residence License on or after the first day that residence halls open for the semester will be considered on an individual basis, within established guidelines, by the appropriate Residence staff members.

2. Failure to check into a residence hall, reside in the assigned room, accept a meal card, eat meals, or pay room and board charges does not release a student from the obligations of the State University of New York at Albany Residence License. Except for those students released from the license or officially withdrawn from the University, students who fail to move into their assigned room will be billed a one quarter (8 week) room charge.

3. Students who have occupied a room and then move out without being officially released from the license, or officially withdrawn from the University, or academically dismissed will be billed a one quarter (8 week) room charge, effective the date of the unauthorized move. This charge will be in addition to a room and board billing for the amount of time actually spent in residence.

4. When a student is offically released from the Residence License he/she must vacate his/her room within 24 hours and complete check-out procedures as described in Section N. Students will be billed for room and/or board until this check-out procedure is accomplished and the meal card is officially returned and accepted by the University.

M. Refund and Rate Adjustment Policies and Procedures

Once a student has entered the residence hall, room and board refunds are based on the date personal effects are removed from the hall and checkout procedures, outlined in Section N, are completed. Room and board refunds are granted in accordance with the following provisions:

1. **Room:** After a student has checked into residence and occupied a room, there will be no refund for the balance of that quarter unless he/she withdraws due to circumstances beyond his/her control. Documentation in **WRITING** must be

submitted to substantiate reasons beyond a student's control. In these situations, the room refund is prorated on a weekly basis—the week beginning on Sunday and ending on Saturday.

2. **Board:** For students permanently leaving the residence hall for the balance of the semester, refunds are made for the number of full weeks remaining in this period for which board and Campus Center Option have been paid in advance. Board refunds are contingent upon surrender of the current meal card. If a student has been away from the residence hall for a period in excess of fourteen days for any reason, he/she may apply through the Residence Director for a refund of board for the period he/she has been away from residence. To qualify for the refund, the student must return the meal card to the University before leaving the residence hall. No refund will be considered unless the meal card has been officially received and accepted by the University.

3. Student teachers, teaching for one quarter beyond commuting distance from the University, must notify their Residence Director of their absence. Unless a student turns in his/her keys and meal card prior to leaving for the student teaching assignment, authorization for a one quarter semester refund will not be given, and the student will be held responsible for his/her room and/or board charges for the entire semester or until these requirements are met. Student teachers, teaching beyond commuting distance from the University, should apply for on-campus housing only for the semester during which they are to reside on campus, if the duration of their assignment is a full semester. Students living on campus who are student teaching in the Albany area as part of their required curriculum, and who have a meal plan that includes lunches, will receive a refund for those lunches missed during their teaching assignment.

4. If there is a change in occupancy which effects the room rate (i.e., increased to normal, or normal to increased) after the first two weeks of the semester, changes in room rental rates become effective with the quarter following the one in which the change occurs. If there is a change in occupancy

during the first two weeks of a quarter, adjustment in room rental rates become effective with the quarter in which the change occurs.

N. Check-Out Procedures

Residence halls close to all students, except those approved for participation in Graduation, on May 17, 1987. All students, when leaving residence at any time of the year, must go to their Residence Director or Resident Assistant to complete check out procedures including:

1. Complete forwarding address card.
2. Return issued residence and mailbox keys in order not to be billed for lost keys and complete appropriate forms.
3. Return meal card.

Your cooperation in observing the provisions of this License will be appreciated. If you have questions, please see a Residence staff member. This License provides students with the opportunity to reside in the residence hall system. Violation of these terms and conditions may result in revocation of this License.

John A. Martone,
Assistant Vice President for
Residential Life & Housing

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

No. 87-2013

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, New York 12224
Telephone (518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
LAWRENCE S. KAHN
Deputy Solicitors General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel

Questions Presented For Review.

1. Whether the regulation of the State University of New York ("SUNY") prohibiting operation of private commercial enterprises in residence halls and elsewhere on SUNY campuses is a valid restriction on commercial speech.

2. Whether SUNY's regulation prohibiting operation of private commercial enterprises in residence halls and elsewhere on SUNY campuses is a valid restriction on use of a nonpublic forum.

3. Whether SUNY's regulation prohibiting operation of private commercial enterprises in residence halls and elsewhere on SUNY campuses is a valid restriction on conduct which, as is the case when any time, place, and manner restriction is implemented, produces an incidental effect on protected speech.

Parties.

The parties to the proceeding in the United States Court of Appeals for the Second Circuit are:

1. Todd Fox, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan and Jaclyn Bernstein, plaintiffs-appellants in the court below.

2. American Future Systems, Inc. ("AFS"), a plaintiff in this action in the United States District Court for the Northern District of New York, did not join the appeal.

3. The Board of Trustees of the State University of New York and D. Bruce Johnstone, individually and as Chancellor of the State University of New York[1] and The State University of New York College at Cortland, and James M. Clark, individually and as President of the College at Cortland, and The State University of New York at Binghamton, and Clifford D. Clark, individually and as President of the State University of New York at Binghamton, and The State University of New York at Albany, and Vincent O'Leary, individually and as President of the State University of New York at Albany, and The State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tonkin, individually and as President of the College of Arts and Sciences at Potsdam, defendants-appellees in the court below.

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[1]Pursuant to Fed. R. App. P. Rule 43(c). D. Bruce Johnstone has been substituted for Clifton R. Wharton, Jr., who was Chancellor of the State University of New York when this action was filed.

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No. 87-2013

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the lower courts are reported as *Fox v. Board of Trustees of the State University of New York*, 649 F. Supp. 1393 (N.D.N.Y. 1986), *rev'd and remanded*, 841 F.2d 1207 (2d Cir. 1988). These opinions are reproduced in the appendix to the petition for certiorari. The opinion of the district court preliminarily enjoining the regulation at issue is reported at 565 F. Supp. 754 (N.D.N.Y. 1983), and is reprinted in the joint appendix at JA4. The opinion of the district court on remand is reported at 695 F.Supp. 1409 (N.D.N.Y. 1988) and is reprinted in the joint appendix at JA55.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 11, 1988, and the petition for certiorari was filed pursuant to 28 U.S.C. § 1254(1) on June 9, 1988. The petition was granted on October 3, 1988. 109 S.Ct. 52.

Constitutional and Regulatory Provisions Involved

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Resolution 66-156 of the Board of Trustees of the State University of New York, as amended by Resolutions 73-26 and 79-100:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events. This resolution shall not be deemed to apply to Auxiliary Service Corporation activities approved by the University.

Statement of the Case

Defendants are various officials and branches of the State University of New York ("SUNY"). SUNY is the largest system of higher education in the Nation, with 64 campuses providing instruction in the arts and sciences, business and commerce, medicine, law, and numerous other disciplines. SUNY also offers an assortment of cultural, social, athletic and artistic activities and opportunities to its students and to the community at large.

1. SUNY campuses and dormitory life.

Twenty-five of the twenty-nine State-operated SUNY campuses contain residence halls, which provide housing for approximately one-third of these campuses' full-time enrollment of 180,000 students (JA177).[1] At least fifteen of these SUNY branches require freshmen to live on campus.[2] For many, perhaps most, of these freshmen, residence in a SUNY dormitory is the first extended sojourn away from their homes and families. For these students, and for all others residing in SUNY dormitories, SUNY attempts to provide a safe and secure educational and social environment in which they can mature and develop.

SUNY dormitories are not mere rental apartments. Rather, they are extensions of the academic life of the campus (T438). As a central part of the university living and learning experience, dormitory life is designed to complement the academic enterprise which is the essential mission of the university (T619-21). SUNY offers numerous programs based in the residence halls and aimed at assisting students' growth and development. These programs help students in obtaining practical information, acquiring and deploying study skills, learning to live with people of heterogeneous backgrounds, coping with stress, dealing with being away from home, choosing a career and finding employment (T572, T619-620). Life in residence halls is also community living; SUNY views the daily interaction among students as part of the educational enterprise being carried out through dormitory life (T573; JA585). It is SUNY's responsibility to oversee the safety and order of its residence halls (JA195), and to provide in those residence halls an environment supportive of its overall educational mission (JA177).

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[1] References to "JA" are to the joint appendix. References to "T" and "Exh" are to the trial transcript and exhibits introduced at trial respectively. The decisions of the district court after trial and of the court of appeals are reproduced in the appendix to the petition for certiorari, cited here by the page number followed by "b" or "a" respectively.

[2] *See SUNY 1988 Application Guidebook*, pp. 14-15.

Until 1985, decisions as to expenditures, staffing, and rent in SUNY dormitories were subject to annual State budget review. Since then, SUNY has managed its residence halls pursuant to a policy of dormitory self-sufficiency, whereby all operating costs must come from revenue generated by and in residence halls (JA193).[3] The self-sufficiency policy gives SUNY the flexibility to make decisions on expenditures and staffing needed to operate its residence halls and to determine annual room rentals.[4]

Continuously since 1966, a regulation of the SUNY Board of Trustees has governed the conduct of commercial enterprises on all State-operated SUNY operated campuses. Resolution 66-156, as amended, provides in pertinent part that:

> No authorization will be given to private commercial enterprises to operate on State University campuses or facilities furnished by the University other than to provide for food, campus bookstore, vending, linen supply, laundry, dry-cleaning, banking, barber and beautician services, and cultural events. (JA86)

This regulation forbids students and their invitees from engaging in on-campus activities the purpose of which is the conduct of business for profit (JA87). It covers, *inter alia*, direct in-person marketing by means of product demonstrations in dormitory rooms.

SUNY's witnesses at trial explained the reasons for the regulation. Several witnesses testified as to the need to preserve the educational atmosphere on SUNY campuses and promote the university's educational mission. Dr. Frank Pogue, Vice President for Student Affairs at SUNY-Albany, noted that commercial

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[3]In 1986, when this action was tried, the total operating budget for the fourteen student residence buildings operated by SUNY-Cortland, the SUNY college at which the events giving rise to this action occurred, was $4.3 million (JA220).

[4]*See* State of New York Executive Budget, April 1, 1988 to March 31, 1989, pp 398-401.

activities in general might disrupt studying in the residence halls (JA196). Moreover, he added, student involvement with other students in the context of a commercial transaction can create tensions among students (JA200-201).

Raymond D. Franco, Assistant Vice President for Student Affairs at SUNY-Cortland, agreed with Pogue as to the potentially disruptive aspects of commercial activities in dormitories. He indicated that students at Cortland study in their dormitory rooms and, indeed, that the college has four "quiet hours" per night, five days a week in its dormitories to facilitate such activity (JA212, 215). He recognized that the college does not seek to control—and frankly cannot control—many noncommercial, potentially disruptive activities such as partying, television-watching, and game-playing, but maintained that the existence of such activities "doesn't mean therefore that we should open [the residence halls] up even further * * * to other activities which I believe are disruptive" (JA216). Opening the Cortland campus to commercial activity would, Franco said, lead the campus to "become even more active", with "many more distractions for students", and possibly cause the administration to "lose control, if you will, over the residence hall environment" (JA206). Dr. William Murabito, Assistant Vice Chancellor for Student Services for the entire SUNY system, shared this view. Recognizing that dormitories were often the site of loud and noisy parties and social gatherings, he opined that "[a]nything added to that * * * really would be too much" (JA180).

It was also clear from the witnesses' testimony that many enterprises desired to make commercial presentations on campus. Franco noted that his experience as Director of Residence Life at SUNY-Cortland was "riddled with interactions with numerous off-campus commercial vendors who have a great desire to come on our campus to do business" (T691). He expressed doubt that confining on-campus commercial activity to students' "invitees" would significantly control commercial traffic, for merchants might then simply offer students an "incentive", in the form of some sort of payment, in order to obtain an invitation and tap into the "rich market of students" (JA210).

Vincent O'Leary, President of SUNY-Albany, demonstrated that Franco's fears were well founded. When O'Leary assumed his current position, he found the campus so overrun with vendors that "it was difficult to walk into the campus center * * * because it was difficult literally to get through all the people selling things" (JA221). Consequently, in 1980, SUNY-Albany undertook to confine commercial activities on campus to "student operations", conducted by students under a permit system (JA221-222). O'Leary found, however, that "people on the outside were coming to the students and saying would you like to make, look, a little money" (JA222). Students were, in short, "broker[ing]" permits to non-students (JA222). "[T]here is", said O'Leary, "a substantial pressure outside to get onto that campus and sell and * * * students can be persuaded by material goods to act as somebody's intermediary in this situation" (JA223).

Although this problem with brokering arose in the center of the SUNY-Albany campus rather than in its dormitories, O'Leary maintained that opening the dormitories to commercial activities by invitees would result in the same problems. "A lot of people" want to come on the Albany campus, and might be willing to offer "some reward for carrying out [a] particular demonstration" (JA223). Indeed, commercial activities in dormitories would be harder to police[5] than they are on the center of campus, for with dormitories an administrator cannot simply "look out a window [and] see all the goods being sold" (JA224).

In addition to discussing the threat to SUNY's educational atmosphere and mission of permitting even commercial "invitees" on campus and in dormitories, SUNY's witnesses testified that campus safety and security would become more problematic. According to O'Leary, SUNY-Albany has problems with both campus safety and dormitory overcrowding (JA224-25). Any stranger on campus is a potential hazard, Pogue opined (T598-599). SUNY has "an obligation to protect students", and "one way to do that is to try to reduce the number of strangers

[5]At the Albany campus the dormitories include 21-story towers (JA227).

who are in and out of the residence hall" (JA195). At present, Franco noted, strangers on the SUNY-Cortland campus "are rather easily identified", and their presence is often reported to and questioned by residence hall staff (JA210-211). However, once a campus is opened to commercial invitees, "it would be possible * * * for anybody to have a legitimate reason to be there" (JA211). "At that point", added Franco, "the ability to notice and to take action in the event that there might be some strange person walking around really is diminished" (JA211).

Thus, as Pogue noted, opening residence halls to commercial enterprises would increase the flow of nonuniversity traffic on campus, requiring stricter monitoring and control (JA199). In order to monitor in a systematic way the flow of traffic in residences, SUNY would have to increase its staff or reassign staff from duties which are educational in nature to monitoring tasks (JA196-97). In Franco's opinion, permitting access even to commercial invitees would require a "central checkpoint" sign-in system in every residence hall, in order to make certain every stranger is in fact a commercial invitee (JA210-211). At SUNY-Cortland the annual operating cost of such a system is estimated at over $250,000.00 (JA220). In keeping with SUNY's policy that all costs for operating residence halls must be offset by revenue generated by the residence halls, that additional cost would be borne by students (JA193). Any increased cost, students have advised SUNY administrators, would prevent many from attending SUNY institutions (JA179).

2. AFS and its marketing strategy.

With two exceptions, plaintiffs in the district court are or were students at various branches of SUNY. The other plaintiffs were American Future Systems, Inc. ("AFS"), a Pennsylvania corporation engaged in selling cookware, china, and tableware to college students, and Kathleen Rapp, a senior level management employee of AFS (JA95). AFS did not join in the appeal to the Second Circuit; Ms. Rapp withdrew as a plaintiff prior to trial.

AFS does not advertise in the print or electronic media. (JA160). Instead it relies on group demonstrations of its products in college and university dormitory rooms or other cost-free facilities (JA138). Such demonstrations are typically arranged as a result of "blind" telephone calls to students whose names and numbers have been obtained from student directories, through referrals from prior demonstrations, or through a procedure called "chatterbooking" (T342-344). In "chatterbooking", an AFS representative solicits students in common areas of a campus to register for and enter a drawing for a vacation (T217). The AFS representative typically follows a "script" for such solicitations and initiates the contact by inquiring whether the student has "signed up for the free Florida holiday drawing" (T218). The holiday is not "free"; it is subject to substantial restrictions and potential surcharges payable by the student (Exh F). Students must list their names and telephone numbers on the drawing cards (T220). They are told that "[i]f you don't win the drawing there's a 50-50 chance you will get a phone call from our company explaining how you can become an automatic winner of the Florida holiday" (T219-220).

Having obtained student names and telephone numbers, one of the 20 to 40 telephone representatives in AFS's booking department calls students and attempts to arrange demonstrations of AFS products in dormitory rooms (JA159-60). AFS—whose "target market" is primarily female (T221)—seeks a student who is willing to act as "hostess" for groups of eight to ten or more students in her own dormitory room (T149-50). In exchange, the hostess receives $50 credit toward AFS merchandise and a Florida vacation (T340, T150). Although this vacation is repeatedly described as "free" in the "booking script" typically followed by AFS representatives during these telephone conversations (T150-151), it is subject to the same restrictions and potential surcharges as the "free" vacation awarded at the "chatterbooking" drawing (Exh F).

If the student agrees to act as hostess, she is sent a "hostess kit" including 15 invitations, which she is expected to distribute to her friends and acquaintances (T223-224). At an agreed-upon time, the AFS representative arrives at her hostess' dormitory and presents the group demonstration (T223). If there are fewer than ten students present initially, the hostess, again following a script, will typically inform them that the same "free" vacation is available as a "door prize", but only if ten or more students are in attendance, and will exhort them to gather additional attendees (JA139; T228-230).

AFS demonstrations dwell on the virtues of the company's tableware and cookware as appropriate complements to the glamorous lifestyle students can expect after graduation,[6] and include some information about nutrition and energy conservation (Exh 11, 14A). AFS uses them to sell—generally on credit—sets of china, cookware, and/or tableware, ranging in price from $650 to $900 exclusive of interest (T346-347, 357; Exh A). The demonstrations commonly conclude with what AFS calls "the contract section", at which purchase contracts for AFS products are distributed and signed, and a "firm up" section, following the representative's collection of deposits on the merchandise (T232-235; Exh A).

On October 19, 1982, Ms. Rapp, who was in the process of consummating sales after a dormitory room demonstration of AFS products at SUNY-Cortland, was asked to leave by campus authorities acting pursuant to Resolution 66-156. When she refused, she was arrested (JA98-99). Subsequently, Todd Fox, a SUNY-Cortland student, sought and was denied permission to host an AFS demonstration (Exhs 35, 36).

On December 2, 1982, AFS, Rapp, Fox, and other SUNY students who professed a desire to host or attend an AFS presentation in a dormitory room filed suit pursuant to 42 U.S.C. § 1983, claiming that the SUNY regulation deprived them of their

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[6]AFS could not credibly urge that SUNY-Albany students living in dormitories have a more immediate need for AFS products, because SUNY-Albany does not permit cooking in dormitory rooms (JA225).

First Amendment right to freedom of speech and seeking declaratory and injunctive relief (JA66-78). According to three of the student plaintiffs, off-campus AFS presentations were not an acceptable substitute for dormitory-room meetings. Two of them gave as their only reason for this belief that a trip off campus or across campus might be dangerous (JA122; Odell Deposition 51). The danger, however, did not deter one of these plaintiffs from going off campus to attend commercial demonstrations at a "chocolate making party" and "lingerie parties" (JA127). The third said simply that "it's convenient" (JA138).

3. The preliminary injunction decision.

On June 3, 1983, before trial, the United States District Court for the Northern District of New York (McCurn, J.) preliminarily enjoined SUNY "from enforcing [Resolution 66-156] to the extent of barring plaintiffs from disseminating and receiving information in the course of group product demonstrations conducted in the dormitory room of an inviting student at SUNY-Cortland". (JA53-54). The court initially rejected SUNY's contention that the case involved only regulable commercial conduct rather than speech. (JA24-25). The court ruled that, as speech that "tended to promote the sales of goods or services", AFS presentations were "commercial speech", and thus subject to government regulation satisfying the requirements set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). (JA26-30). For a government restriction on commercial speech to be valid, *Central Hudson* requires that (1) the speech in question concern lawful activity and not be misleading; (2) the asserted government interest(s) vindicated by the regulation be substantial; (3) the regulation directly advance the asserted interest(s); and (4) the regulation be no more extensive than necessary to serve the interest(s). 447 U.S. at 566. The district court found that the interests asserted by SUNY in promulgating Resolution 66-156—namely, "preventing disruption", "protecting the safety and security of the students", and "protecting students from commercial exploitation"—were "legitimate and substantial". (JA33-36). The district court nonetheless concluded, "based solely on the

record adduced at" the preliminary injunction hearing, that there was "only an indirect link" between the first two of these aims and the resolution. (JA37). Although the regulation did "directly advance the university's interest in consumer protection", it was "more extensive than is necessary to serve that interest". (JA37). The district court also held, however, that the AFS presentation consisted of both a "communicative portion wherein the products are described and other information is imparted, and a subsequent transactional portion wherein sales contracts and credit agreements are concluded". (JA42). Only the former portion was "commercial speech"; the latter was mere "legal conduct", and not "'speech' protected by the First Amendment". (JA42-43). The court held that SUNY could forbid such conduct without implicating First Amendment rights. (JA43). Accordingly, it enjoined the regulation only insofar as it barred the dissemination and receipt of commercial information, leaving SUNY free to control the consummation of sales. (JA53-54). It also held that "reasonable" time, place, and manner restrictions on AFS presentations would be appropriate. (JA54).

In response to the preliminary injunction, SUNY-Cortland promulgated regulations applying solely to AFS, permitting dormitory room presentations at certain times by registered invitees, but prohibiting "commercial activity involving the consummation of sales" on college premises (JA88-92). Plaintiffs amended their complaint to object to these regulations as well. According to AFS representatives, the regulations, which, *inter alia*, required that the college receive 24 hours advance notice of demonstrations and that demonstrations commence between the hours of 2 and 9 p.m., were unreasonable because they restricted their ability to make a living. (JA154-55, 157-58). Other vendors continued to be subject to the ban set forth in SUNY Resolution 66-156.

4. The decision after trial.

After trial, the district court upheld the SUNY regulation and dismissed the complaint. The court eschewed a *Central Hudson* analysis of the case, instead applying a line of this Court's cases involving government efforts to preserve public property for

intended purposes in the face of an assertedly incompatible use. The district court held that although "'the campus of a public university, at least as to its students, possesses many of the characteristics of a public forum'. . . student dormitory rooms do not constitute such public forums." (27b). Rather, the court viewed them as "limited" public forums, opened by the state for the use of students participating in social, cultural, and educational activities (27b). However, with regard to commercial activities, the court held that SUNY was properly maintaining a traditional nonpublic forum (28b). Because the court did not view dormitories as public forums for the purpose of commercial activities, it required only that SUNY's regulation with respect to such activities be "viewpoint-neutral and reasonable in relation to the forum's purpose" (29b). The regulation applied equally to all commercial operations; thus its viewpoint-neutrality was not seriously contested (29b). The court characterized the interests asserted by SUNY as preservation of the educational environment in SUNY dormitories, assurance of student safety, avoidance of the use of public property for private gain, prevention of commercial exploitation of students and prevention of dormitory overcrowding (31b). Given these purposes, the SUNY regulation was "reasonable" and therefore valid, especially in light of "the broad power of the states to formulate and implement educational policy * * * and to control its university facilities" (32b). Noting that SUNY-Cortland's interim regulations "were enacted solely in response to [the] preliminary injunction", the court found that plaintiffs' challenge to these regulations "no longer present[ed] a controversy for this court to decide" (32b-33b).

5. The Court of Appeals decision.

The student plaintiffs, but not AFS, appealed to the Second Circuit, asserting a First Amendment right to receive information from AFS and other commercial invitees in their dormitory rooms. AFS filed an *amicus curiae* brief. By a 2-1 decision, the Second Circuit reversed the judgment of the district court and remanded the case for further proceedings.

The court rejected the district court's public forum analysis. Such an approach was inapplicable, the court said, because with AFS no longer a party, the case involved not "the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights" (12a-13a).

The court below then applied the *Central Hudson* test. Because Resolution 66-156 bans all for-profit activities on SUNY campuses, defendants did not question whether plaintiffs met the first prong of the test (14a). The Second Circuit found that SUNY's interests were substantial (14a-15a). It noted, however, that it was unclear whether the regulation "directly advances" SUNY's interests, for the district court, relying on public forum analysis, "considered only whether the Regulation was reasonably related to the asserted governmental interests, not whether it directly advanced them" (15a). Accordingly, it remanded the action to the district court for appropriate findings.

The court also found that the fourth prong of *Central Hudson* required a remand. Rejecting the conclusion of the Third Circuit in a virtually identical case also involving AFS, it held that the "no more extensive than necessary" language in *Central Hudson* requires that a government regulation of commercial speech be the "least restrictive means" available (15a-16a). It found that this Court "implicitly endorsed" such a test in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), by virtue of its "deference to the legislature's assessment of the least restrictive measure" (16a). Because the district court had based its holding only on the reasonableness of the regulation, and indeed had suggested that "a less restrictive measure might better balance the respective interests of the parties", the court remanded the case for "appropriate findings" "under [its] analysis" (16a).

The Second Circuit did not address SUNY's assertion that its regulation was a valid time, place, and manner restriction.

Judge Mahoney dissented. He reasoned that AFS's retreat to *amicus* status was unimportant: the issue remained "a corporation's right to hawk housewares in a college dormitory", and the "essential nature of the commercial transaction and resulting free speech issue" remained what they had been below, "although admittedly now to be viewed from the vantage point of the student hawkees" (20b). Judge Mahoney believed that the SUNY regulation "directly advances" SUNY's substantial interests, and thus satisfies the third prong of *Central Hudson* (19a). He also declined to read the fourth prong of *Central Hudson* as a least restrictive means test (19a). He noted that *Central Hudson* was in any event distinguishable as involving "a complete ban on advertising" (19a; emphasis in original), and further indicated that the case was correctly decided by the district court in terms of public forum analysis (18a).

6. The decision on remand.

On remand, the district court applied the *Central Hudson* test. It assumed *arguendo* that the resolution directly advanced SUNY's interests, but found that "it is not the least restrictive means for advancing those interests" (JA62). In reaching this conclusion, the district court relied on plaintiffs' testimony "that other means, less restrictive than a total ban on commercial activity, had been implemented [at] at least one comparable university", whereas defendants in the court's view had "offered no credible testimony as to why similar tailoring could not be accomplished at SUNY" (JA62). In the district court's opinion, the higher cost to students of a less-restrictive central checkpoint system did not alter this result, for "[u]nder [a least restrictive means] approach, cost is immaterial" (JA64 n 7).

The district court also scrutinized SUNY-Cortland's interim regulations, even though they had been adopted solely in response to the court's 1983 preliminary injunction and had been out of use since the court's decision on the merits in 1986. The court reversed its earlier position that these time, place, and manner restrictions need only be "reasonable", instead interpreting the Second Circuit's decision to require that they be the "least

restrictive means" (JA63 n 6). Because more costly but less restrictive central checkpoint or escort systems were available, the interim regulations did not withstand such scrutiny (JA64-65).

On October 18, 1988, defendants moved in the district court for an order pursuant to Fed. R. Civ. P. 52 and 59 to amend the district court's findings of fact and its judgment. Defendants also applied, pursuant to Fed. R. Civ. P. 62, for an order staying enforcement of the district court's judgment on remand pending this Court's determination of the present proceeding. The motion is returnable on December 6, 1988, until which time the effect of the district court's decision on remand has been stayed.

Summary of Argument

SUNY's Resolution 66-156 prohibits in-person conduct of for-profit business on SUNY-operated campuses. Speech is an essential but subordinate component of that proscribed conduct. The regulation does not prohibit AFS from hawking its wares. Nor does it restrain students from receiving commercial messages from AFS or any other for-profit provider of goods and services. Students may and do receive those messages virtually everywhere, including in SUNY-operated dormitory rooms.

SUNY's restriction on the conduct of commercial enterprises on its campuses may be viewed from any of a number of legal perspectives, as is revealed in the various lower court opinions in this case. These perspectives are mutually complementary, and each demonstrates the validity of SUNY's regulation.

The Second Circuit saw Resolution 66-156 as a government restriction on commercial speech, and sought to measure the restriction by the test set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980). It erred, however, in transforming the intermediate level of scrutiny applied by this Court in commercial speech cases into a requirement that government employ the "least restrictive means" whenever it places restrictions on such speech. This

holding overlooks the subordinate position of commercial speech on the scale of First Amendment values and creates an improper parity between commercial and noncommercial speech. It also ignores the fact that this Court employs an intermediate level of scrutiny to examine time, place, and manner restrictions, and the Court's holding that this approach does not create a least restrictive means test. Moreover, this Court, in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), did not require a government to resort to a readily available less restrictive alternative means of regulating commercial speech in order to satisfy *Central Hudson.*

Rather than a least restrictive means test, *Central Hudson* requires only that the government interests served by a given regulation not be served as well by a lesser restriction. SUNY's substantial interests in fulfilling its educational mission and promoting low-cost campus safety and security would suffer by virtue of a narrower restriction. Its experiments with permitting commercial activities by "invitees" on the SUNY-Albany campus under a permit system led to a large and disruptive commercial presence on campus. SUNY witnesses further indicated that an influx of nonstudents on campus would present safety problems, and that the security systems necessary to respond to these problems could be implemented only at immense cost.

As the district court below found, the SUNY regulation is also a valid restriction on speech in a nonpublic forum. SUNY dormitories are clearly nonpublic forums for the purpose of commercial activities; SUNY has never opened them for such activities. Because the SUNY regulation is manifestly viewpoint-neutral and reasonable, it satisfies constitutional requirements for restrictions on use of a nonpublic forum.

Forum analysis applies to SUNY dormitories despite SUNY students' rights of access to their dormitory rooms. The public forum doctrine vindicates the government's power to preserve public property for its intended use. This interest does not depend on whether a party seeking to make an anomalous use of government property already has access to it.

Further, the SUNY regulation may be seen as a restriction on the use of SUNY property for commercial activity, aimed at forestalling the harmful effects of such activity on the campus environment. Thus, it may be upheld as a time, place and manner restriction, for it prohibits only a particular "manner" of speech (face-to-face interaction with commercial invitees) on campus, rather than banning commercial speech entirely. It is "content-neutral" in that it is aimed at curbing the harmful effects on educational atmosphere, safety and security of that particular manner of speech, rather than at the content of the speech itself. The regulation is "narrowly tailored" by virtue of curtailing no more speech than necessary to accomplish its purpose. It also leaves open ample alternative channels of communication: SUNY students may meet with commercial enterprises off campus absolutely without restriction, and may contact or be contacted by commercial concerns through the mass media, by telephone, and through the mail.

The SUNY resolution is equally a valid restriction on commercial use of SUNY property if it is seen as a regulation of conduct with only an incidental effect on speech. It aims at the commercial conduct that adversely affects the SUNY environment, rather than the speech which accompanies such conduct. It furthers important government interests that, in their concern with the effects of commercial activity on university life, are unrelated to the suppression of speech. Finally—as is required as well by both *Central Hudson* and time, place, and manner analysis—Resolution 66-156, viewed as a restriction on conduct, curtails no more speech than necessary to vindicate the government interests involved.

ARGUMENT

I

The SUNY regulation governing operation of for-profit commercial enterprises on campus satisfies the standards enunciated in *Central Hudson*, standards which do not impose a "least restrictive means" requirement.

A. The fourth prong of *Central Hudson* is not a "least-restrictive-means" test.

Both courts below applied commercial speech analysis to this case.[7] The Second Circuit, however, transformed the intermediate level of scrutiny this Court has applied in assessing government restraints on commercial speech from a requirement that such restraints be "no more extensive than necessary to further" a substantial government interest, *see Central Hudson*, 447 U.S. at 569-570, into a far higher level of scrutiny which permits government to employ only the "least restrictive means" of

[7]Plaintiffs have made the extraordinary assertion (JA75-76, and in both the district court and Court of Appeals below) that AFS presentations are not "commercial" but rather "pure" speech. They base the claim entirely on the facts that AFS presentations contain modest amounts of information on cookware, nutrition, energy, and credit, that they offer "an opportunity to observe and learn first-hand about group selling practices" (JA75), and that some of the plaintiffs have testified that they would be interested in attending AFS presentations primarily for their educational content, regardless of the fact that from AFS's standpoint the speech is entirely commercial (JA132, 148-49). Like the Third Circuit in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985) ("Penn State"), both courts below rejected the argument out of hand. As this Court has said, there is a "common-sense distinction between speech proposing a commercial transaction * * * and other varieties of speech". *Central Hudson*, 447 U.S. at 562. A *speaker's* purpose or motive is relevant to the process of identifying commercial speech. *In re Primus*, 436 U.S. 412, 438 n 32 (1978). But no definition of commercial speech has ever considered the listener's motivation, obviously because the factor is unworkable. As this Court has noted, even "entirely 'commercial'" speech "may be of general public inter-

(footnote continued on following page)

vindicating its interest. An examination of this Court's commercial speech cases and the theory underlying them, however, reveals that the *Central Hudson* test is not nearly so strict and exacting.

Although the First Amendment protects commercial speech, this Court has repeatedly held that commercial speech receives less protection than other constitutionally guaranteed forms of expression. *See, e.g., Bolger*, 463 U.S. at 64-65 (1983); *Central Hudson*, 447 U.S. at 563. Rather than equating commercial and noncommercial speech, this Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression". *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). This "limited" protection is, moreover, not merely a reflection of the lesser value of commercial speech as compared to noncommercial speech. It is

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est". *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). For virtually any instance of commercial speech, a listener can be found who, like plaintiffs, will attest that his interest in the speech was confined to its informational content. According to plaintiffs, such testimony from even a single listener precludes a finding that the speech is commercial, even though all other listeners (like AFS's many purchasers) might indicate it is commercial. In short, as plaintiffs view the matter, there is no such thing as commercial speech. In light of this Court's finding that commercial speech includes even "comments on public issues" when they are made "in the context of a commercial transaction", *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983), the position that AFS presentations are educational rather than commercial is untenable, even though, as one of plaintiffs' experts opined, a student who spends "$700 or $1,000" on a product and later regrets doing so has had "a good learning experience" (Krafft T61). In the succinct words of Judge Adams, concurring in *Penn State*, "although the borderline between commercial speech may in certain cases be difficult to determine, kitchenware sales do not require [courts] to approach that borderline". 752 F.2d at 868 (Adams, J., concurring).

also a means of perpetuating the protection accorded speech nearer the core of the First Amendment, for "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech". 436 U.S. at 456.

The Second Circuit's imposition of a least restrictive means test for commercial speech accomplishes that impermissible parity. As a practical matter, few restrictions would survive such a test, for "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down". *Widmar v. Vincent*, 454 U.S. 263, 279 n 3 (1981) (Stevens, J., concurring in the judgment) (*quoting Illinois Election Board v. Socialist Workers Party*, 440 U.S. 173, 188-189 [1979] [Blackmun, J., concurring]). A least restrictive means test is undoubtedly appropriate when scrutinizing a content-based restriction on political speech. Such speech is of central importance to the First Amendment, and regulations of it receive the "most exacting scrutiny". *Boos v. Barry*, ____ U.S. ____, 108 S.Ct. 1157, 1162, 1164 (1988). For this reason, this Court regularly requires that content-based (but not content-neutral) restrictions on noncommercial speech be the least restrictive means of serving the interest in question. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 467 (1977); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *cf. Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (time, place, and manner restriction on political speech need not be least restrictive means). Under the Second Circuit's holding, commercial speech, despite its "subordinate" position, achieves full parity with noncommercial speech, and the "leveling process" warned against in *Ohralik* is complete.

Neither the language nor the holdings of this Court's commercial speech cases permit such a result. *Central Hudson* itself does not impose a least restrictive means test. Rather, applying an intermediate level of scrutiny, it requires only that a restriction on commercial speech be "no more extensive than is necessary to

serve" a substantial government interest. 447 U.S. at 566. In other words, the restriction must be "narrowly drawn". 447 U.S. at 565.

The Third Circuit, in a case involving AFS, parsed this language correctly. In *Penn State*, the court of appeals interpreted facts virtually identical to the facts here in light of the same *Central Hudson* test to conclude that *Central Hudson* does not impose a least restrictive means requirement. In *Penn State*, as in the present case, state university students asserted a First Amendment right to host and attend AFS presentations in dormitory rooms. The Third Circuit noted the similarity between the "narrowly drawn"/"no more extensive than necessary" language of *Central Hudson* and the requirement, set forth in this Court's cases dealing with restrictions on the time, place, and manner of speech, that such restrictions be "narrowly tailored to serve a legitimate government interest". *Penn State*, 752 F.2d at 865-866 (*citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297 [1984]). Because this Court stated in *Clark* that the "narrowly tailored" requirement in time, place, or manner regulations is not a least restrictive means test, the Third Circuit concluded that the *Central Hudson* "narrowly drawn"/"no more extensive than necessary" requirement was to be interpreted the same way. 752 F.2d at 866 (*quoting Clark*, 468 U.S. at 297, and *Regan v. Time, Inc.*, 468 U.S. 641, 657 [1984]). Thus, the Third Circuit noted that, while "we might be able to imagine alternative regulations that accomplish Penn State's objectives while interfering less with the students' and AFS's rights to communicate", nonetheless "[t]here is a whole realm of permissible means of accomplishing the university's objectives, and our function must be limited to determining whether the school has chosen an acceptable-not the least restrictive-alternative". 752 F.2d at 866.

This Court's holdings in time, place, and manner decisions handed down after *Penn State* demonstrate that the Third Circuit correctly interpreted both *Clark* and the equivalent language in *Central Hudson*. Thus, for example, in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ("*Vincent*"), a city ordinance prohibited the posting of signs on

public property, including signs posted by plaintiffs containing political speech promoting a certain candidacy for office. The government interests involved were the elimination of "visual clutter" and the promotion of esthetic interests. Although "plausible public policy arguments" supported an ordinance with "a less severe effect on expressive activity such as" plaintiffs', 466 U.S. at 815-816, nonetheless this time, place, and manner regulation was valid because it "respond[ed] precisely to the substantive problem which legitimately concerns the City" and "curtailed no more speech than [was] necessary to accomplish its purpose". 466 U.S. at 810. This approach is indistinguishable from this Court's discussion of the fourth prong of *Central Hudson*, which requires only that a regulation be "no more than necessary to serve" a "substantial" government interest. 447 U.S. at 566.

Even more decisive on this score is this Court's decision in *United States v. Albertini*, 472 U.S. 675 (1985). In *Albertini*, this Court reversed the Ninth Circuit, rebuking it for basing its holding on the fact that the time, place, and manner regulation in question was not essential to the government interest it served "in any absolute sense". 472 U.S. at 688. This observation, the Court said, "provides an answer to the wrong question by focusing on whether there were conceivable alternatives" to enforcement of the regulation. 472 U.S. at 688. The question is not whether "there is some imaginable alternative that might be less burdensome on speech". Rather, a restriction on speech "is no greater than is essential * * * so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation". 472 U.S. at 688-689.

A winter in a web of thought will disclose no significant semantic or logical distinction between the "no greater than essential"/"achieved less effectively" language of *Albertini*, which expressly declines to impose a least restrictive means test, and the "no more extensive than necessary"/"served as well" language of *Central Hudson*. Therefore, *Central Hudson* may be accurately viewed through the lens of the time, place, and manner cases, and government regulation of commercial speech need not be the

"least restrictive means" of regulation. *See Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring in the judgment).

There are important reasons for having, in one circumstance, an absolute requirement that a restriction on speech be the "least restrictive means" and, in another circumstance, a requirement, embodied in *Central Hudson*, that a less restrictive alternative be employed only if the government interest it vindicates will be served as well by the narrower restriction. The former requirement, properly applied to political and other noncommercial speech, recognizes the central importance of such speech in the constitutional scheme and the relatively attenuated power of the state to inhibit it. The latter requirement incorporates a recognition of the stronger government interest in the control of constitutionally "subordinate" commercial speech and enhanced awareness of what this Court views as the focus of the *Central Hudson* test: "the 'fit' between the [government's] ends and the means chosen to accomplish those ends". *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341 (1986).

The holdings of *Central Hudson* and its progeny reveal that this Court does not measure commercial speech restrictions by an absolute least restrictive means test. In *Central Hudson* itself, the Public Service Commission of New York banned all "promotional advertising" by utility companies, which it defined as "advertising intended to stimulate the purchase of utility services". 447 U.S. at 559. The chief state interest vindicated by such a ban was that in energy conservation. This Court accepted the State's argument that its significant interest in conserving energy was directly advanced by a ban on advertising meant to increase the demand for electricity. 447 U.S. at 569. The regulation, however, was not "narrowly drawn" because the State had failed to show that its interests could not be served as well by a regulation that permitted speech "promoting electrical services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources". 447 U.S. at 570. In other words, the State's regulation was invalid because it could have been less restrictive *while still wholly vindicating the signifi-*

cant interest at stake. Indeed, the regulation in *Central Hudson*, by also prohibiting speech that might ultimately aid in conserving energy use, ran contrary to the State's expressed interest.

In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion), this Court upheld a ban on certain types of commercial billboards because "[t]he city has gone no further than necessary in seeking to meet its ends", which were "directly related" to the prohibition in question. 453 U.S. at 508, 511.

Most significantly, this Court's decision in *Posadas* is irreconcilable with a least restrictive means test. In *Posadas*, the Puerto Rico Legislature prohibited local casinos from advertising gambling facilities to residents of Puerto Rico, while permitting them to advertise to tourists elsewhere. The government interest at stake, which this Court deemed substantial, was "the reduction of demand for casino gambling by the residents of Puerto Rico". 478 U.S. at 341. The plaintiffs argued that the law violated the fourth prong of *Central Hudson*, and that that prong should have been satisfied, not by suppressing commercial speech that encourages gambling, but by promulgating additional speech designed to discourage it. 478 U.S. at 344. Such "counterspeech" is obviously "less restrictive" than a total ban on advertising, yet this Court upheld the total ban, noting simply that it is for the Legislature to decide whether the less restrictive measure "would be as effective in reducing the demand for casino gambling as a restriction on advertising". 478 U.S. at 344. To make the matter even clearer, *Posadas* relies on a Fifth Circuit case upholding a ban on liquor advertising and finding that a "less restrictive" program of counterspeech would be less effective than of such a ban. 478 U.S. at 344, *citing Dunagin v. City of Oxford*, 718 F.2d 738, 751 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

If *Central Hudson* truly imposed a least restrictive means test, *Posadas* could not have been decided as it was. The "counterspeech" proposed by plaintiffs was obviously a less restrictive alternative than the complete advertising ban actually enacted, yet the government need not have resorted to it to comply with *Central Hudson*. Indeed, the Court accepted without scrutiny the

Legislature's conclusion that the "counterspeech" would have been less effective.

This Court's recent attorney-advertising cases, on which plaintiffs can be expected to rely, are not to the contrary. *In re R.M.J.*, 455 U.S. 191, 203 (1982), this Court invalidated what it called "an absolute prohibition [by the State of Missouri] on certain types of potentially misleading information" in attorney advertisements. Surmising that the State's inability to oversee such advertising for possible deceptiveness was the reason for the ban, the Court refused to find "that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception". 455 U.S. at 206-207. In other words, the possibility that some attorney advertising might be deceptive or misleading and difficult to regulate did not entitle the State to outlaw truthful advertising as well.

Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court invalidated what it repeatedly characterized as Ohio's "prophylactic rule" or "blanket ban" prohibiting certain content in attorney advertisements. 471 U.S. at 643, 644, 648, 649. The purported difficulty of distinguishing truthful and nondeceptive advertising from false and deceptive advertising did not justify banning all advertising with a given content. Most recently, in *Shapero v. Kentucky Bar Association*, ____ U.S. ____, 108 S.Ct. 1916 (1988), this Court again dealt with a "blanket ban" on targeted, direct-mail solicitation by attorneys. 108 S.Ct. at 1922. Again, the State argued that a prophylactic rule was necessary because such solicitation was immune to effective state oversight on a case-by-case basis. As in *R.M.J.* and *Zauderer*, the Court rejected this argument, finding that the asserted capacity for abuse by individual advertisements did not justify the total ban.

Thus, the factual pattern in each of the attorney advertising cases is virtually identical: a state imposes a prophylactic ban on the content of such advertising, and this Court responds by noting that the state's concern can be vindicated by means short of a blanket ban. At no point do these cases resemble the factual

setting of the present case. First, the SUNY regulation is not a blanket ban. SUNY makes no attempt to forbid all commercial speech on campus, or to regulate students' in-person interaction with commercial speakers off campus. Secondly, the state interest asserted is not primarily that of the need to control deceptive commercial speech or to avoid the trouble of distinguishing truthful from false advertising on a case-by-case basis. Rather, as discussed more extensively in the next section, the SUNY regulation vindicates two other substantial state interests: the need to preserve the educational atmosphere and mission of SUNY campuses, and the need for campus safety and security at the lowest cost. The commercial presence on campus that would result from even the case-by-case scrutiny of purported commercial "invitees" urged by plaintiffs would, the record indicates, be intolerable. The danger on campus would increase due to the influx of nonstudent "strangers". And the cost of implementing the security system necessary for monitoring invitees would be significant and borne entirely by students. In other words, the problems which the SUNY regulation aims to cure would remain even with the supposedly "less restrictive" approach urged by respondents. As in *Metromedia*, SUNY "has gone no further than necessary in seeking to meet its ends". The prophylactic bans in the attorney-advertising cases, by contrast, swept too far to withstand constitutional scrutiny.

There is no more exacting means of reviewing a government restriction on speech than by requiring that it be the "least restrictive means" of regulation. Commercial speech, with its "subordinate position in the scale of First Amendment values", *Ohralik*, 436 U.S. at 456, does not merit such protection. The decisions of this Court neither require nor permit it. See *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring in the judgment). And the fourth prong of *Central Hudson* does not impose a "least restrictive means" test on government regulation of commercial speech.

B. The SUNY regulation is a valid restriction on commercial speech under the Central Hudson test.

Once it is acknowledged that *Central Hudson* does not incorporate a least-restrictive-means test, it is plain that Resolution 66-156 is valid. It readily satisfies all four elements of *Central Hudson*.

Defendants have not put the lawfulness or truthfulness of AFS presentation in issue (*see* p 12, *supra*). Both plaintiffs and the court below (14-15a) acknowledge that SUNY's interests in fulfilling its educational mission and promoting campus safety and security are substantial. Thus, the controversy focuses on the last two elements of *Central Hudson*: whether the regulation "directly advances" SUNY's interest, and whether it is "no more extensive than is necessary to serve" those interests. *Central Hudson*, 468 U.S. at 566.

There can be little question that SUNY's interests are "directly advanced" by the regulation in question. The court below did not suggest otherwise, noting simply that "the district court considered only whether the Regulation was reasonably related to the asserted governmental interests, not whether it directly advanced them" (15a). Dissenting Judge Mahoney suggested that there is no "significant difference between the 'reasonable relationship' and 'directly advances' criteria" (19a). But, even if these standards somehow differ, "either test", as Judge Mahoney noted, is "satisfied on this record" (19a).

There is elaborate evidence in the record illustrating the importance of the regulation in achieving SUNY's purposes of promoting its educational mission and preserving campus safety and security. *See* pp 4-7, *supra*. As this Court has observed, "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities". *Widmar, supra*, 454 U.S. at 268 n 5. There is a "mutual interest of students, faculty members and administrators in an environment free from disruptive interference with the

educational process". *Healy v. James*, 408 U.S. 169, 171 (1972). However broadly one defines that process, merchants' presentations of demonstrations aimed at selling their wares are not an essential part of it (JA229-30).

Moreover, the regulation clearly minimizes the burden on university facilities and disruption attendant upon permitting merchants on campus, even if they are "invitees". The unhappy experience of SUNY-Albany attests to this. *See* p 6, *supra*. SUNY-Albany attempted to confine commercial activity on campus even more narrowly than plaintiffs now propose: by restricting commercial activities to "student operations" under a permit system. Clever merchants, eager to obtain rent-free access to the rich student market, offered "incentives" to students to "broker" commercial permits and thus "invite" the merchants on campus. The students obliged, with a predictably disruptive commercial intrusion on the campus center. It is idle to suggest that, because the disruption occurred primarily on the campus at-large rather than in the residence halls, there is no evidence supporting the usefulness of the restriction as applied to dormitories. SUNY should not be forced to repeat this melancholy experiment in its dormitories before concluding that the best way to preserve its property for its educational mission is to ban all putative commercial invitees. SUNY has ample basis for believing that permitting in-person commercial solicitation on campus and in dormitories will burden university facilities and disrupt its educational mission. *See Metromedia*, 453 U.S. at 508. Prohibiting such contact obviously "directly advances" its aims.

SUNY's goal of promoting campus safety and security is also "directly advanced" by the regulation. Considerations of privacy aside, an intrusive "central checkpoint" system in each and every SUNY dormitory might conceivably serve to assure that only a few legitimate business invitees enter dormitories. There is undisputed testimony, however, that the checkpoint system can be implemented only at significant cost to students, whose already strained finances may be taxed to the breaking point as a result. The alternative is radically unsafe and crowded campus buildings in which strangers roam at will in the guise of commercial

invitees. Because nonstudent strangers are a security threat on campus, and the regulation in question excludes a group of such strangers, the regulation "directly advances" campus safety and security.

Nor is it significant that SUNY tolerates student activity that is assertedly more disruptive and unsafe than the speech at issue. In *Metromedia*, the asserted underinclusiveness of the partial ban on billboards was not fatal, for the municipality need not have concluded that its interests outweighed *all* commercial interests in order to regulate some such interests. 453 U.S. at 512. In the same fashion, SUNY concluded that it could not or did not wish to regulate student activity more closely than it now does. As the court below noted, this "does not mean [the regulation] does not 'directly advance' the asserted governmental interests" (15a). *See Penn State*, 752 F.2d at 865 n 30.

Resolution 66-156 also satisfies the fourth part of the test, for it is "narrowly drawn"—that is, the government interests at stake could not "be served as well by a more limited restriction on commercial speech". *Central Hudson*, 447 U.S. at 564. The question is thus not whether the more limited restrictions proposed by plaintiffs will assist in fulfilling the university's aims. Rather, the pertinent question is whether anything short of SUNY's approach will serve SUNY's purposes *as well*.

The credible and unchallenged testimony of SUNY's administrators indicates that SUNY's regulation is as "narrowly drawn" as it can reasonably be. SUNY-Albany's experience eloquently demonstrates that confining commercial transactions to invitees is no restriction at all, for merchants will offer students incentives to come on campus, and students will accept them (*see* pp 6, 27, *supra*). The result will be the overwhelming commercial presence experienced at SUNY-Albany under its permit system. Similarly, the parties are in agreement that safety and security are problems at SUNY campuses. SUNY now promotes safety to the limit of its financial and human resources. Its aim of low-cost security will not be "served as well" by requiring it to purchase equipment and hire staff in order to implement a central checkpoint system.

Such a system involves substantially higher costs. And because dormitories are funded by student dormitory fees, establishment of a central checkpoint system would amount to a school-imposed, student-funded subsidy of outside commercial enterprises (JA192).[8]

Nor is it significant that plaintiffs presented as witnesses college administrators who testified that their campuses approached the same issues differently. Dr. Marvin Wachman, former President of Temple University, indicated that Temple stations a guard at the door of every dormitory, and that any visitor must either have a university identification card or be met and escorted by his host (JA111). Similarly, Howard Diamond, Special Assistant to the Chancellor at the University of Illinois at Champaign-Urbana, indicated that his university "require[s] that anybody who is not living in the residence halls be escorted by faculty, staff or student" (JA176).

SUNY has no quarrel with Temple's decision to establish a central checkpoint system in its residence halls and pay the added cost that system of heightened security entails. Nor does SUNY question the determination of the University of Illinois (Champaign-Urbana) to create an escort program and to deploy the resources needed to implement such a system. AFS benefits from these systems because they happen to be compatible with its marketing strategy. The essential question is whether these alternative schemes serve SUNY's purposes "as well" as the scheme contemplated in Resolution 66-156. As SUNY administrators

[8]Rent-free access to facilities is a critical component of AFS's marketing scheme. It trains its representatives to hold demonstrations in the student hostess' dormitory. As alternatives, representatives are advised to hold demonstrations at the apartment of a friend of the hostess, a local church meeting room, a YWCA meeting room or a nearby hotel or motel (JA138). AFS supplies a strong incentive for using rent-free facilities: representatives are advised that they are responsible for the "cost, if any" of demonstrations (JA138). In fact, according to Carl Weinberg, an AFS regional sales manager (T329), without access to SUNY students' dormitory rooms, he would not recommend that an AFS manager "move into this area and try to make a living" (JA160-61).

O'Leary and Murabito testified in this case, SUNY has elected to use its limited resources in other ways (JA192, 227-28) and it is disinclined to add to the financial burdens of its students merely to accommodate a merchant's desire to avoid the substantial costs of mass-media advertising (JA160, 236).

As Justice Stevens has said, "[b]ecause every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities". *Widmar*, 454 U.S. at 278 (Stevens, J., concurring in the judgment). More generally, "where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools'" *Healy*, 408 U.S. at 180 (*quoting Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 [1969]). This concern with usurping the power of state university administrators to choose among viable options in implementing educational policy led Judge Mahoney, dissenting below, to note that "'the education of the Nation's youth is primarily the responsibility of parents, teachers and state and local school officials, and not of federal judges'"(19-20a; *quoting Hazelwood School Dist. v. Kuhlmeier*, ____ U.S. ____, 108 S.Ct. 562, 571 [1988]). The same concern led Judge Adams, concurring in *Penn State*, to ask, and doubt, "whether the sale of kitchenware may implicate sufficiently fundamental First Amendment concerns to justify a court's intrusion in the affairs of Penn State University". *Penn State*, 752 F.2d at 870 (Adams, J., concurring). "To extend the arm of the federal courts to protect" such "kitchenware sales", he opined, would be "to ignore the institutional autonomy of the university". *Id.* Even the district court below was "particularly hesitant to second-guess [SUNY] given the broad power of the states to formulate and implement educational policy * * * and to control its [*sic*] university facilities [citations omitted]". 649 F. Supp. at 1402 n 12. If the federal courts begin scrutinizing and second-guessing manifestly reasonable and effective regulations imposed by state universities on commercial speech, the "comprehensive authority" of these

institutions to govern themselves will become a thing of the past. If, in *Posadas*, this Court declined to overturn the Legislature's conclusion that a less-restrictive regulation of commercial speech would be ineffective, then *a fortiori* it should leave alone the decision of responsible educators to the same effect on a matter peculiarly within their expertise. The "fit" between SUNY's interests and its restriction on commercial speech is precise, and Resolution 66-156 therefore satisfies constitutional requirements.

II

SUNY residence halls are nonpublic forums, on whose use the SUNY regulation is a valid restriction.

A. SUNY residence halls are nonpublic forums.

Although the lines of demarcation are sometimes blurred, government property may be divided into three classes—public forums, limited public forums and nonpublic forums—and the First Amendment rights of those who use the property vary accordingly. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). "Traditional public forums", such as streets and parks, are "places which by long tradition * * * have been devoted to assembly and debate". *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). "Designated" or "limited" public forums are places which the State has opened for use by the public for expressive activity by certain speakers or about certain subjects. 460 U.S. at 48. Nonpublic forums include all "[p]ublic property which is not by tradition or designation a forum for public communication". 460 U.S. at 45. The residence halls on the campuses of the SUNY system fall into the last of these categories, *see* pp 11-12, *supra*, and the First Amendment rights of those who would use them must be evaluated according to the "different standards" governing such "nonpublic forums". 460 U.S. at 45.

At trial, counsel for plaintiffs unequivocally indicated that "[w]e are not contending that there is any public forum involved" (T421). It is easy to see why plaintiffs recognize that a SUNY dormitory is not a public forum, whether traditional or limited. A

limited public forum must be opened by the government intentionally. It cannot be created "by inaction or by permitting limited discourse". *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802-803 (1985). Courts "will not find that a public forum has been created in the face of clear evidence of a contrary intent", or "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity". 473 U.S. at 803. Indeed, "where the principal function of the property would be disrupted by expressive activity, [this] Court is particularly reluctant to hold that the government intended to designate a public forum". 473 U.S. at 804.

In light of these descriptions, it is plain that the residence halls in the SUNY system are not limited public forums. For decades, SUNY has had an express policy prohibiting the operation of any "private commercial enterprises in its dormitories or elsewhere on its campuses. See p. 4, *supra*. Clearer evidence of an intent not to create a public forum with regard to commercial invitees can scarcely be imagined. Likewise, there is abundant evidence in the record demonstrating that the operation of commercial enterprises in student dormitories is inconsistent with the "principal function" of SUNY property, which is, of course, achievement of SUNY's educational mission. *See Widmar*, 454 U.S. at 268 n 5. Plainly, such operations on campus disrupt that function.

The district court below agreed that SUNY has properly maintained its dormitories as traditional nonpublic forums for commercial activities. It viewed the dormitories as limited public forums for students only, for participation only in social, cultural, and educational (but not commercial) activities (27b-28b). Even if the district court had not classified SUNY dormitories as nonpublic forums for commercial activities, it properly upheld the regulation barring students from having commercial presentations in dormitories. In *Cornelius*, this Court held that a limited public forum may be created "by government designation of a place * * * for use by certain speakers, or for discussion of certain subjects". 473 U.S. at 802. And even in a limited public forum, First Amendment rights "in any event extend only to other

entities of similar character" to those which are permitted in the forum. *Perry*, 460 U.S. at 48. If a state university is a public forum at all, it is limited to student activities that comport with its educational "mission". *See Penn State*, 752 F.2d at 864-865 (dormitory room is public forum for students' speech consonant with educational mission). The character of AFS presentations—like all other commercial transactions, expressly forbidden in SUNY dormitories—is in no way "similar" to the educational, social, and cultural activities to which SUNY can be said to have opened its dormitories.

Viewed from the perspective of Justice Blackmun and the other justices joining him in dissent in *Cornelius*, SUNY dormitories are not limited public forums for purposes of commercial activity, for, as discussed above, such uses are incompatible with the intended uses of the property. *See* 473 U.S. at 826. Even if such uses were compatible, SUNY's decision to exclude commercial activity and the commercial speech attendant thereon would satisfy the heightened standards these members of the Court have endorsed, because, as detailed at § I *supra*, Resolution 66-156 "is necessary to serve and is narrowly tailored to serve", 473 U.S. at 827, at least two compelling governmental purposes—promotion of SUNY's educational mission and preservation of campus safety. *See* pp 26-31, *supra*. Moreover, we suspect that Justice Stevens, who also dissented in *Cornelius* and who has repeatedly expressed skepticism about the value of forum analysis, would not insist that university administrators justify their decision to exclude sales of pots and pans in student dormitories by showing a compelling state interest for doing so. *See Widmar*, 454 U.S. at 278 (Stevens, J., concurring).

B. Forum analysis applies to SUNY dormitories.

Plaintiffs argue that forum analysis of any sort is improper in this case. The court of appeals agreed, finding public forum treatment "inapposite" because the case did not "invol[ve] the rights of third persons to gain access to state-owned property to give or receive speech" (12a-13a). Both plaintiffs and the Second Circuit apparently believe that the public forum doctrine applies

only to cases where third parties seek *access* to public property. But an examination of this Court's decisions and the policy underlying public forum analysis reveals what *Perry* squarely indicates: that forum analysis applies to govern the *use* to which all "public property" may be put, 460 U.S. at 46, even when the would-be user of such property already has access to it.[9]

A concern with preserving public property for its intended *use* has animated the development of the public forum approach. Thus, for example, an influential article on the subject speaks of forum doctrine as forbidding an "anomalous use" of government property. H. Kalven, "The Concept of the Public Forum: *Cox v. Louisiana*", 1965 Supreme Court Rev 1, 12. Similarly, a seminal decision of this Court notes that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated". *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (emphasis supplied). This passage has been quoted in virtually every significant public forum case succeeding it. *See, e.g., Cornelius*, 473 U.S. at 800; *United States v. Grace*, 461 U.S. 171, 178 (1983); *Perry*, 460 U.S. at 46; *Greer v. Spock*, 424 U.S. 828, 836 (1976).

The more recent public forum cases maintain this Court's concern with the uses to which public property may be put. Thus, for example, *Cornelius* notes that this "Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes". 473 U.S. at 800. Similarly, this Court speaks of its forum-based decisions in *Greer* and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), as "precedent that rests on the special interests of a government in overseeing the use of

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[9]In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. ____, 108 S.Ct. 2568, 2571 (1987), this Court granted certiorari in part to decide whether public forum analysis "is applicable when access to a nonpublic forum is not restricted". Because the regulation in question was facially unconstitutional for overbreadth, the Court did not reach the public forum issue.

its property". *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980). *See also, United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 136 (Brennan, J., concurring in the judgment) ("For public forum analysis, '[T]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time'") (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 116 [1972]).

An examination of the purpose of the public forum doctrine reveals that this Court has not employed the term "use" in these cases carelessly, as a synonym for "access". The doctrine vindicates the *use* to which the government dedicates its property. If a party with access to a given forum could then force that forum to be put to an incompatible use, the doctrine would have little value or meaning. Thus, for example, in *Cornelius*, this Court treated as a nonpublic forum a charity fund-raising drive aimed at federal employees, to which certain legal defense funds sought access. This Court evaluated the case in terms of the nature of the forum, not the identity of the parties seeking access to it. It upheld the exclusion of advocacy organizations from the drive in light of the government interests in "minimiz[ing] disruption to the federal workplace", "ensur[ing] the success of the fund-raising effort", and "avoid[ing] the appearance of political favoritism". 473 U.S. at 813. This reasoning did not depend on the identity of the litigants. It apparently would have been fully applicable even if the plaintiffs had been federal employees asserting, like the student plaintiffs here, a right to receive material from advocacy organizations. The employees are not "third parties" in such a case, and presumably have "access" to the fund-raising drive. Yet a proper analysis of the case would still depend on determining the nature of the drive on the public-forum spectrum and analyzing the government's interest in preserving the forum for its intended use. That use is equally at stake any time prohibited speech may occur on public property, regardless of whether the right being asserted is that of an excluded speaker or an already-present listener. The fact that chiefly "third parties" have underwritten appellate cases involving a doctrine which this Court fully delineated only five years

The discussion at pp 26-28, *supra*, of whether SUNY's "narrowly drawn" regulation "directly advances" SUNY's purposes, may be applied to resolve this issue as well. SUNY's aims of controlling the commercial presence on campus and providing low-cost safety and security are concededly legitimate. As discussed at pp 26-28, *supra*, SUNY's response—to ban all commercial activity—is surely reasonable.

The fact that some commercial activity occurs on campus, in the form of media advertising, telephone communication, and mail contact, does not undermine the restriction or render it less reasonable. *Cf. Greer*, 424 U.S. at 838 n 10. Indeed, the presence of such activity insures that ample alternate means of receiving commercial messages are readily available to students. *See Perry*, 460 U.S. at 53. And, of course, students remain free to pursue off-campus commercial contacts without restriction. The fact that use of a nonpublic forum may be "the most efficient means of delivering [or, presumably, receiving] the speaker's message" is of no consequence under the First Amendment. *Cornelius*, 473 U.S. at 809.

SUNY's regulation of commercial activity on its campuses and in its dormitories is, as the district court below originally found, a viewpoint-neutral and reasonable means of vindicating its educational mission and preserving campus safety. The governmental proprietor of a nonpublic forum need undertake no more. Therefore, the regulation is valid.

III

The SUNY regulation is a valid, content-neutral attempt to restrict the harmful effects on SUNY campuses of the noncommunicative portion of commercial conduct.

When public property is determined to be a forum for public communication, the First Amendment inquiry, as we have seen, is not at an end. *See, e.g., Clark*, 468 U.S. at 293; *Perry*, 460 U.S. at 45; *Widmar*, 454 U.S. at 276. Courts must consider questions concerning protection of public property from the deleterious

effects of conduct, whether or not accompanied by speech. Indeed, these questions apply even if forum analysis does not. *See Clark*, 468 U.S. at 293. In this regard, the SUNY regulation may be viewed either as a time, place, and manner restriction, or as a restriction on commercial conduct which has an incidental effect on speech. The standards governing both types of restrictions are the same. See *Clark*, 468 U.S. at 298. These modes of analysis have in common a recognition that, when its interests are substantial, the government is not powerless to regulate the conduct and physical environment with, through or by means of which speech occurs. These approaches, like forum analysis, vindicate the government's ability to restrict the use to which property is put, even when that use involves protected speech.

A. The SUNY regulation is a valid, time, place, and manner restriction.

Regardless of whether the district court properly sustained the SUNY regulation as satisfying standards applicable to nonpublic fora, they should be sustained as valid time, place, and manner regulations of speech protected by the First Amendment.[10]

A state university is empowered to establish such restrictions on speech occurring on its property. *Widmar*, 454 U.S. at 276. A time, place, and manner restriction impinges upon the *form*

[10]Contrary to respondents' assertion that petitioners did not argue in the district court that time, place and manner analysis is applicable, *see* Brief in Opposition to Petition for Certiorari, pp 15, 23, petitioners there urged that the SUNY regulation "is not a regulation of speech", but rather "a regulation of a place where it may occur" (JA176). Moreover, the district court itself, in its decision on the preliminary injunction motion, indicated that SUNY might promulgate "reasonable" time, place and manner regulations. (JA54). In any event, issues addressing whether, when, where and how public property may be used for expressive purposes are simply further refinements on forum analysis. See *Perry*, 460 U.S. at 46.

rather than the *content* of speech. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977). A regulation that does not ban speech, or a particular type of speech, altogether, but merely puts conditions upon the time, place, or manner in which it may occur, is properly analyzed under the standards governing time, place, or manner restrictions. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986). Resolution 66-156 is valid as such a restriction.

Time, place, and manner restrictions may apply equally to public property, *see Perry*, 460 U.S. at 45-46, and private property, *see Renton*, 475 U.S. 41. They may apply to commercial speech, *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977); *Virginia Pharmacy*, 425 U.S. at 770, or to noncommercial speech, *see, e.g., Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). All "'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication". *Renton*, 475 U.S. at 47.[11]

It is clear, first of all, that the SUNY resolution may be analyzed in these terms, for it does not ban any speech "altogether". It simply regulates the manner (prohibiting face-to-face interaction with commercial invitees) and the place (prohibiting dormitories and elsewhere on campus) of certain commercial activities. SUNY students may receive without restriction many other "manners" of commercial speech in their dormitory rooms.

[11]This standard has been applied to religious speech, see *Heffron*, and political speech, *see Vincent*. Because of the subordinate place assigned commercial speech in First Amendment jurisprudence, greater deference is due those charged with responsibility for managing public property in determining whether the interest served by a restriction is sufficient to justify the effect of the restriction on commercial speech. *See Posadas*, 478 U.S. at 341-42.

Similarly, they may meet off campus with commercial enterprises absolutely without restriction. The prohibition thus resembles the one upheld in *Heffron*, where the state of Minnesota required that a particular *manner* of speech (in-person solicitation) occur at a particular *place* (booths on the state fairgrounds) and nowhere else on the state fairgrounds. The fact that the present plaintiffs might *prefer* to receive such speech in their dormitory rooms does not mean that they may not hear it elsewhere. Nor does it mean that they may not receive other manners of speech from AFS in their dormitory rooms. There is no limit to the content or duration of telephone conversations between SUNY students and AFS representatives. Indeed, the initial contact between AFS and its student hostesses is usually by telephone. Students may also receive AFS's message through the mass media (including student newspapers and radio) and through direct mail. All communications transmitted by these means can be received both inside and outside dormitory rooms. Manifestly, their ability to deliver or receive commercial speech is not significantly impaired by the regulation. *See infra*, § III B (SUNY regulation discussed as valid restriction on conduct with incidental effect on speech). SUNY's time, place, and manner restriction cannot be treated as a "blanket ban".

It is also clear that the SUNY restriction is "content-neutral". Obviously, "content-neutral" does not mean "without regard to the type of speech" being regulated. *Heffron*, 452 U.S. at 649. If that were what the term meant, then time, place, and manner restrictions solely on commercial speech would be impermissible. Rather, a content-neutral restriction is one that "applies evenhandedly to all who wish to" engage in the speech at issue. *Id.* There is no question that SUNY's regulation applies across the board to all commercial invitees, and thus is content-neutral.

This Court's recent lengthy discussions of content neutrality in *Boos* and *Renton* make clear that SUNY's regulation meets this requirement. As the Court noted in *Renton*, content-neutral regulations are "those that 'are justified' without reference to the content of the regulated speech". 475 U.S. at 48 (emphasis in original), *quoting Virginia Pharmacy*, 425 U.S. at 771. Thus, even though the ordinance at issue in *Renton* treated "adult" theaters differently from other theaters, the ordinance was valid because it was "aimed not at the *content* of the films shown" at the theaters, "but rather at the *secondary effects*"—on crime, retail trade, and property values—"of such theaters on the surrounding community". 475 U.S. at 47 (emphasis in original).

The restriction at issue in *Boos*, on the other hand, prohibited display of signs with a certain content in close proximity to foreign embassies, lest they bring foreign governments into "public odium" or "public disrepute". 108 S.Ct. at 1161. According to the Court, "[t]his justification focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners". 108 S.Ct. at 1164 (emphasis in original). It thus "regulate[d] speech due to its potential primary impact", and was therefore "content-based". 108 S. Ct. at 1164. By contrast, this Court explained, the ordinance in *Renton* "appl[ied] to a particular category of speech because the regulatory targets happen to be associated with that type of speech". 108 S. Ct. at 1163.

Similarly, it is the "secondary effects" of on-campus commercial speech that the SUNY regulation attempts to forestall. SUNY's primary concern is not the paternalistic one that its students might be taken advantage of by aggressive or unscrupulous merchants, or somehow tainted by their contact with commerce (JA225). Rather, SUNY's concern is focused on the effects which a significant commercial presence would have on the educational atmosphere and safety of its campuses. *See* pp 4-7, *supra*. The regulation is based on the "secondary" phenomena "associated with" in-person commercial solicitation on campus. In this significant sense, the regulation is content-neutral.

It is also narrowly tailored to serve a legitimate government interest. *Clark*, 468 U.S. at 293 (1984). Of course, this is not a least restrictive means requirement. *See Albertini*, 472 U.S. at

689; *Clark*, 468 U.S. at 299; *Regan*, 468 U.S. at 657.[12] *See also*, § I (discussing "narrowly-drawn" requirement in context of *Central Hudson*). This Court has made abundantly clear what it means by "narrowly tailored": "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy". *Frisby v. Schultz*, ____ U.S. ____, 108 S.Ct. 2495, 2502 (1988). If a time, place, and manner regulation "responds precisely to the substantive problem which legitimately concerns" the government—if, in other words, it "curtails no more speech than is necessary to accomplish its purpose"—it is valid. *Vincent*, 466 U.S. at 810. Thus, in *Frisby*, a ban on residential picketing was narrowly tailored because the prohibited picketing was "directed primarily at those who are presumptively unwilling to receive it", and the ban did no more than vindicate the government's interest in the protection of residential privacy. 108 S.Ct. at 2502, 2504. The restriction went no further than it had to to protect the legitimate interest at stake. Similarly, in *Vincent*, the "visual blight" caused by the posting of signs on public property was "created by the medium of expression" at issue. 466 U.S. at 810. Thus, "[b]y banning the signs, the City did no more than eliminate the exact source of the evil it sought to remedy", and its ban was narrowly tailored. 466 U.S. at 808. As noted at p 21, *supra*, this was so even though less restrictive alternatives were available. 466 U.S. at 815-816.

These cases make clear that the SUNY regulation is valid. This is especially so because a "narrowly-tailored" regulation need not be judged "solely by reference to the [plaintiffs] at hand".

[12]As the cited cases demonstrate, the district court below, on remand, was obviously mistaken in its belief that the Second Circuit's opinion requires that the SUNY interim time, place, and manner regulations be the "least restrictive" means available. The Second Circuit's misinterpretation of *Central Hudson* has no bearing on an analysis of the SUNY regulation as a time, place, and manner restriction. The Second Circuit was silent on the latter issue.

Clark, 468 U.S. at 296. As this Court noted in *Albertini*, time, place, and manner regulations "must be evaluated in terms of their general effect". 472 U.S. at 689. For example, in *Heffron*, the restriction on solicitation was not "measure[d] by the disorder that would result from granting an exemption solely to [plaintiffs]". 452 U.S. at 652. Rather, the Court considered the "widespread disorder" that would result from permitting all "similarly situated" groups to solicit funds. 452 U.S. at 653.

In similar fashion, the SUNY regulation responds precisely to the problems that would result if all commercial enterprises—not just AFS—were permitted into dormitories at the invitation of a student. There is abundant evidence in the record of SUNY's experience that even a system confining commercial activities to students' invitees can undermine the university's educational mission by causing a vast and disruptive commercial presence on campus. Likewise, the record shows that adopting a "central checkpoint" or other monitoring system in each dormitory to investigate the *bona fides* of asserted commercial invitees would increase the hazardous presence of outsiders on campus, exacerbate overcrowding, and require reinforcement and reassignment of administrative staff at substantial cost. The SUNY regulation, restricting only one type of commercial speech in a particular place, responds precisely to these problems. It is thus narrowly tailored.

Finally, as discussed at p. 41, *supra*, the SUNY regulation leaves open ample alternative channels of communication between students and commercial concerns. The mere fact that plaintiffs must go off campus for in-person commercial presentations is not significant. *Cf. Greer*, 424 U.S. at 839. One plaintiff, it is true, noted that for someone "who wouldn't get the chance to go out and get out to the stores * * * and look at different things for purchase, it's convenient" (204). But mere convenience or efficiency, for either speaker or listener, is not a sufficient basis for overturning an otherwise valid regulation. *See Cornelius*, 473 U.S. at 809. Similarly, the two plaintiffs who expressed misgivings about walking on their campuses in order to attend an off-campus AFS presentation overlook the fact that there is substan-

tial evidence from SUNY to the effect that permitting a commercial presence on campus and in dormitories would actually enhance danger on SUNY campuses by radically increasing the number of nonstudent strangers who might plausibly claim to be commercial invitees.

Yet this is the extent of the testimony dealing with the supposed inadequacies of the available alternatives. Conspicuous by its absence is the slightest shred of evidence that SUNY students suffer any hardship as a result of the deprivation of commercial contact to which the regulation assertedly subjects them. There is no testimony to the effect that SUNY students are deprived of either information about goods and services, or of actual goods and services themselves, whether the goods are high-quality pots, pans or anything else.

The SUNY regulation thus leaves ample—indeed, abundant—alternative channels of information open to students. It is plainly content-neutral, and it is narrowly tailored. As such, it is a valid time, place, and manner restriction.

B. The SUNY regulation is a valid restriction of conduct with an incidental effect on speech.

It is not just by means of time, place, and manner restrictions that the government's concern with the effects of certain speech-connected uses of property may be vindicated. As this Court has noted, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms". *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The SUNY regulation, which aims to protect SUNY campuses from the effect of commercial conduct, restricts speech only incidentally. It is reviewable and sustainable under the standards articulated in *O'Brien* and its progeny for dealing with such an incidental restriction.

It is clear, as a threshold matter, that Resolution 66-156 affects speech only incidentally, in the process of restricting conduct. As discussed above, the SUNY regulation vindicates the university's interests in promoting its educational mission and preserving

campus safety and security at the lowest possible cost. It is commercial *conduct* that threatens these interests: a widespread potential commercial presence on campus that threatens the educational environment on SUNY campuses and in dormitories, and compromises attempts to guarantee student safety. SUNY's regulation aims at the commercial conduct that causes such problems, rather than the speech that is a necessary if subordinate component of that conduct. *Cf. Ohralik*, 436 U.S. at 457.

As an incidental restriction, SUNY's regulation is valid "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest". *O'Brien*, 391 U.S. at 377. Detailed application of this test is unnecessary here, for this Court considers it "little, if any, different from the standard applied to time, place, or manner restrictions". *Clark*, 468 U.S. at 298. As this Court further noted in *Clark*, its analysis in *Vincent* of the City of Los Angeles' ban on the posting of signs on public property initially framed the issue in the case in terms of the *O'Brien* test and then upheld the ban, without indicating any shift in perspective, after undertaking a time, place, and manner analysis. *Clark*, 468 U.S. at 298 n 8. If, as we have shown in the preceding section, the SUNY regulation is valid as a time, place and manner restriction, it is equally valid as an incidental restriction on speech.

SUNY's substantial interests in promoting its educational mission and preserving campus safety and security at reasonable cost would be accomplished less well by anything other than the regulation now in place. These interests, moreover, have nothing to do with the suppression of speech or ideas. They aim, instead, to curb commercial conduct and its effects on the campus environment. Therefore, Resolution 66-156 is a valid incidental restriction on speech.

CONCLUSION

Whether viewed as (1) a government restriction on commercial speech; (2) a regulation governing use of a non-public forum; (3) a time, place or manner restriction; or (4) a regulation governing commercial conduct, with an incidental effect on speech, SUNY's regulation on in-person commercial speech is constitutional. Accordingly, the judgment of the Court of Appeals should be reversed, with directions that the complaint be dismissed.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

O. PETER SHERWOOD
Solicitor General
and Counsel of Record

PETER H. SCHIFF
LAWRENCE S. KAHN
Deputy Solicitors General

DANIEL SMIRLOCK
Assistant Attorney General
of Counsel

RESPONDENT'S

BRIEF

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October Term, 1987

The Board of Trustees of the State University of New York, et al.,

Petitioners,

v.

Todd Fox, Edward R. Detweiler, Stephanie Vaiano, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

HENRY T. REATH
(Counsel of Record)
WAYNE A. MACK, JR.

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6347

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This case involves the constitutionality of a regulation adopted by the Trustees of the State University of New York ("SUNY" or the "University"), which, as applied, constitutes a total ban on its students' rights to invite to their private residence hall rooms (leased space), to speak with and listen to, anyone who is compensated or could derive a profit from the visit.

The specific questions presented for review are:

1. Is not the SUNY regulation *unconstitutionally vague and overbroad* since its infringement on speech turns on an administrative official's illogical interpretation which prohibits students from meeting and listening, in the privacy of their leased space, to all compensated guests, including tutors, attorneys, doctors, job counselors, as well as business invitees.

2. Does not the SUNY regulation unconstitutionally infringe upon the student plaintiffs' *core free speech rights* since, as applied, it prohibits students from participating in lawful, safe, non-disruptive and educational invited speech opportunities, within the privacy of their leased space.

(Continued on next page)

3. Does not the SUNY regulation also infringe upon the student plaintiffs' rights, if measured by *commercial speech standards*, since SUNY failed to prove by record evidence (a) that its total ban, (which runs counter to the practices of the mainstream of state universities and colleges), directly advanced the asserted interests, and (b) as recognized by both courts below, also failed to establish it was no more extensive than necessary.

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COUNTERSTATEMENT OF THE CASE

Introduction

The SUNY regulation overturned by the court below on first amendment grounds, was, as interpreted and applied, an absolute ban on any SUNY student's right to invite anyone to his or her private dormitory room on campus – (his or her home and legal residence while furthering one's higher education) – if the invited guest receives compensation or otherwise may make a profit from the visit. (J.A. 181, 260-61)

This brief is submitted on behalf of students enrolled at SUNY colleges and campuses (the plaintiffs/respondents), who brought and intervened in this action. They did so because it is their free speech rights, not the rights of their invitees, that have been infringed by what the district court below, as well as SUNY's representatives, characterize and concede is a "total ban." (Pet. App. 31b; J.A. 260-61)

It is regrettable that SUNY's counsel, and the amici in support, have, in the misplaced zeal of their advocacy, grossly distorted the record and issues by wrongfully arguing to this Court that this case concerns the rights of commercial vendors "to hawk pots and pans" and of itinerant peddlers to force their entrance into the residence halls to sell their wares. That is not true. It is because of such incorrect and misleading statements that are rampant throughout the brief, that counsel for the students has had to devote far more space to this Counterstatement of the Case than should be required in a brief to this Court.

The students do not dispute (in fact, they enthusiastically support), a university's right to adopt strict rules that absolutely prohibit (1) uninvited peddlers or other persons to randomly roam the residence halls, and (2) student use of dormitory rooms for on-going commercial businesses. (J.A. 138; R. 208)

Similarly, they have always agreed to and support the university's right to establish reasonable rules of conduct in university residence halls, unrelated to speech,

affecting the peace, safety and quality of dormitory life. (*Id.*) But as for invited guests, there should be no distinction between those who are paid and those who are not.

The text of the challenged SUNY regulation only prohibits, (subject to certain exceptions not presently relevant), individual campus authorities to authorize "commercial enterprises to operate" on its campuses or in its facilities. (J.A. 86) However, as interpreted and applied by administrative officials, it has been turned against the students to prohibit them from participating in lawful, peaceful and non-disruptive speech opportunities including:

- ¶ Tutoring for pay in the rooms – either by fellow students, or professional tutors (J.A. 162, 182);
- ¶ Discussions with professional invitees such as a career counselor, lawyer, stockbroker, life insurance representative, doctor, or any other person who offers professional advice or renders a service, if such invitee is compensated or could make a profit from such an appearance (J.A. 133-35, 181-83);
- ¶ Conversations with paid solicitors who seek signatures to petitions for legislative action, or to enable a candidate to run for elective office (J.A. 181);
- ¶ Presentations by any invitee who furnishes information, or takes orders for the purchase of goods or services. (J.A. 181)

SUNY claims, but has failed to prove, that its total ban is necessary to promote its educational mission and preserve safety. The regulation was adopted, applied and enforced without any empirical evidence to justify SUNY's asserted concerns, notwithstanding that it had had more than 10 years within which to do so. (R. 799-801).

In addition, the ban runs counter to the unrebutted evidence of the practices of the mainstream of state universities and colleges throughout the United States, that like SUNY sensibly ban the "operation of commercial enterprises," but unlike SUNY permit students to invite

and speak with compensated guests on the same basis as any other guest. (J.A. 111, 157-59, 169-74)

The plaintiffs in this case are mainstream young adult students, (old enough to vote and to be drafted for military service), who are leaders in student government and campus life. (J.A. 113-119, 130-35, 141-42, 143, 144-45, 150)

They seek reassurance from this Court, by affirming the court below, that they did not leave their constitutional rights at the "schoolhouse gate"; and that in the protection of their rights to listen to and receive information from invited guests in the privacy of their campus homes, the Constitution works as well for them, as it does for their more strident contemporaries who push their claims to constitutional guarantees to their outer limits.[1]

How The Action Arose

The original action challenging the University's infringement of students' constitutional rights, was brought jointly by a commercial invitee, American Future Systems, Inc. ("AFS"),[2] and by students outraged at the shocking search, forcible ejection, handcuffing, and arrest of a woman sales representative who was their guest at a private "Tupperware-type party," hosted by a SUNY student in her private on-campus dormitory room. (J.A. 97-99, 131).

At all times throughout this litigation, the only issue raised was that of the constitutional rights of the students, as invitors, to listen to speech which they wanted to hear. AFS, as the invitee, contended only that its rights to be present and speak were derivative through, and

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[1] The significance of this case to students is reinforced by the strong amici support the students have received from a number of student organizations across the country.

[2] AFS is a corporation which at the invitation of a host and friends, demonstrates and sells high quality cookware, china, crystal and tableware. See discussion at pages 12-14 below.

secondary to, the rights of the students who had invited it. (J.A. 76)

As the case unfolded, and the students became more aware of the broad application of the regulation by SUNY administrators to student core free speech activities, a larger group of students, leaders in student government and campus activities, sought to join the action and file an amended Complaint. Over SUNY's vigorous objections, the students' motion was granted and the caption was amended. From that point forward, AFS, as one of the prohibited business invitees, took a backseat in the litigation. It did not join in the appeal to the Second Circuit, nor has it appeared in the proceedings before this Court, other than, through separate counsel, to file, an amicus brief in opposition to the petition for certiorari.[3]

SUNY's Total Ban On Student Speech

History Of Resolution 66-156

The SUNY regulation at issue, Resolution 66-156, was enacted by the SUNY Board of Trustees in 1966.[4] As amended by Resolution 73-56 in 1973, and Resolution 79-100 in 1979, the regulation states as follows:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning,

[3] That amicus brief did not address any of the relevant substantive issues or assert any speech rights for AFS. Rather, it sought only to clear the record regarding what AFS perceived as misstatements and unwarranted inferences of unethical conduct and high pressure salesmanship and marketing practices, many of which are restated or inferred in SUNY's current brief. They are totally irrelevant to the issues advanced by the students in this appeal.

[4] SUNY is governed by a board of 16 Trustees, appointed by the Governor, who are empowered to make rules and regulations for the government of the University. N.Y. Educ. Law §§353, 355 (McKinney 1985).

> banking, barber and beautician services and cultural events. (J.A. 86)

The minutes and internal memoranda of the SUNY Board of Trustees indicate that the regulation was initially enacted in response to one Trustee's concern over "proposals . . . to establish branch banks on campuses of the University." (Answers to Plaintiffs' First Set of Interrogatories Nos. 9, 23) Faced with this concern, the Trustees discussed the general question of the use of SUNY campuses by "private commercial enterprises" and took action "to prohibit the establishment of any commercial enterprise on any of our campuses." (*Id.*) As initially enacted, the regulation contained exceptions for private commercial enterprises providing for "food, laundry, dry cleaning, barber and beautician services and cultural events." In addition, the regulation excepted Faculty-Student corporation activities "approved by the University." (*Id.*)

In 1973, the SUNY regulation was amended by the Trustees to "include campus bookstore operation among those services which could be provided to State University campuses by commercial enterprises." (*Id.*)[5]

In 1979, it was amended again to "add a limited number of commercial uses which could be authorized." (*Id.*) At that time, the Trustees were advised that the amendment was appropriate in that "since 1966, the [T]rustees have had a policy whereby authorization could be granted to certain types of private commercial enterprises to operate on university campuses." (*Id.*) The amendment permitted the very enterprise, banking, which gave rise to the original regulation enacted in 1966, as well as enterprises providing vending services, legal beverages and linen supply, to operate on campus. (*Id.*)

[5] The Trustees were advised that "the advantages offered by private enterprises – bulk purchasing, experienced management and willingness to take theft control and enforcement measures – promise a more efficient and economical operation of bookstore services." (*Id.*)

The Regulation As Applied

Although the history and the actual text of the SUNY regulation reflect a ban merely on the right of local campus authorities to extend "authorization" for the operation of certain private "commercial enterprises," SUNY officials, as a means of preventing students, on a one time basis, from inviting and receiving information from compensated guests in their dormitory rooms, have interpreted and applied the regulation in a far broader manner.

As applied and enforced, the regulation, according to SUNY representatives, constitutes a "total ban" on the students' speech with any compensated speakers. (J.A. 260-61, 181, 207; Plaintiffs' Exhibit 48 at 132-33) It prohibits, as stipulated by SUNY, "any student from inviting any third party invitee into [their residence hall] room if the purpose of the meeting is to secure information or services, professional or otherwise, *if the third person invitee is being paid money or seeks to make a profit out of his or her participation.*" (J.A. 181, 87, 133, 161) (emphasis supplied).

The broad and absolute nature of the SUNY regulation is not in dispute:

- It is applicable to all compensated invitees, whether a fellow student or other third party, who receive bona fide invitations from students to their residence hall rooms, as well as to uninvited door-to-door solicitors. (J.A. at 161-62)
- It is applicable to speech which involves substantial educational and informational content. (J.A. 133, 163, 181-84, 261)
- It is equally applicable to lawful, safe, nondisruptive and nonexploitive speech, as to disruptive and unethical activity. (J.A. 162-63, 258)
- It is applicable across the entire campus, even to speech taking place within a student's private campus home. (J.A. 207) SUNY has not made or offered to make alternative space available to the students. (J.A. 190-91)

Moreover, the specific First Amendment activities which SUNY prohibits are not in dispute. SUNY officials, during pretrial discovery and at trial, identified a long line of prohibited speech activities, such as:

- *Tutoring*: A student from using his room to be tutored, or "to tutor other students for a fee." (J.A. 162, 182)
- *Lawyers*: "[A] group of students from inviting a lawyer who for a fee would come and tell them about what it means to go to law school, . . . what the legal profession is all about, what one should know about the law, what one's legal rights [are]." (J.A. 181)

  "[A] student who had been given a small inheritance by an aunt or some family representative and that student wanted to consult with a lawyer as to his or her legal rights and wanted to use his or her dorm room as the place for the meeting." (J.A. 182)
- *Medical Doctors*: "[A] group of young women students that decided they wanted to bring in an outside medical doctor to meet with them and talk to them about the issues of women's health, fertility, abortion, birth-control and such subjects and they all were to chip in to pay a fee for the time and services of that third party invitee." (J.A. 182-83)
- *Job Counselors*: A student from inviting and meeting with "a person who had a private job counseling service who for a fee would counsel students regarding appropriate jobs and job opportunities on graduation." (J.A. 133)
- *Stockbrokers*: "A group of students [that] wants to invite a stockbroker to meet with them and give them advice regarding investments to make in the stock market." (J.A. 135)

SUNY's Alleged Need For The Total Ban

SUNY attempts to justify its total ban on the ground that it is necessary to preserve the University's educational mission and to promote safety.[6] (Pet. Br. 27).

SUNY has not considered the possibility that a less extensive regulation than a total ban might adequately serve these interests. (J.A. 191, 204, 218-19, 236) Nor does SUNY have any empirical data or studies supporting its need for the total ban. (J.A. 188, 202, 219, 236)

Instead, SUNY speculates concerning its "feeling" and "fear" as to what might happen without the total ban. (J.A. 205-06) For example, SUNY officials speculate that without the ban it may be necessary to install a central checkpoint system. (J.A. 197, 211) It admits that it has not made a study to support this allegation. (J.A. 204) Nor, has it "thought . . . out" whether such a system would be necessary if a distinction was drawn between invited guests and uninvited door-to-door solicitors. (*Id.*)

In addition, SUNY neglects to advise the Court that such checkpoint systems are already in place at many SUNY campuses affecting about "less than half" of all SUNY students. (R. 48, 510; Plaintiffs' Exhibit 22 at 36) Yet, despite these systems, the total ban remains in effect and students on those campuses are not permitted to invite compensated guests to their rooms. (*Id.*)

Moreover, for over ten years, SUNY has been aware of the fact that a number of other state universities had implemented a less extensive regulation which permitted students to invite compensated guests to their rooms, while banning door-to-door solicitation. (R. 799-801) Many of these universities do not have central checkpoint facilities and have encountered no safety problems. (R. 323-27) SUNY has never attempted to contact or consult any of these universities concerning their experiences in implementing their regulations. (J.A. 202, 219)

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[6] The senior SUNY representative responsible for enforcing the regulation described safety as an "ancillary" concern. (R. 48; Plaintiffs' Exhibit 22 at 84).

The sole "support" SUNY posits for the total ban is the experience of one SUNY campus in permitting commercial vendors to sell in an outdoor public area on campus. This experience, which took place 15 years after Resolution 66-156 was enacted, concerned outdoor commercial booths set up, in a manner similar to a fairground, on a podium in front of the SUNY-Albany campus center in the early 1980's. (J.A. 221-22) SUNY points to no evidence that a comparable situation ever existed with the residence halls and is "not aware" of whether there are any organizations "that come into a student's room only at the invitation of a student host." (J.A. 204-05)

The Student Plaintiffs – Why They Joined In The Lawsuit

Respondents are SUNY students who wish to enjoy the free exercise of their core free speech constitutional rights and to participate in discussions with their own, and any other student's guests, and to invite persons of their choosing to their dormitory rooms without University interference or censorship. (J.A. 113-19, 130-35, 141-42, 143, 144-45, 150)

In total, seven students testified at trial. They described how the SUNY regulation impacted on their rights and why they joined as plaintiffs in the litigation.

> Philip Jay Botwinik, a junior at SUNY-Albany, stated:
>
> I think the constitutional rights of students should be upheld. And this case I believe depicts an issue of grave importance to many students living in the dorms and outside the dorms.
>
> . . . .
>
> I feel the right to be able to do whatever I want within my own room or home away from home so long as that is legal and does not infringe upon the rights of others is very important. And the right to discuss whatever student matters of importance is – is essential for student empowerment and for student learning. (J.A. 144)

Similarly, Edward R. Detweiler, a student government representative at SUNY-Cortland, described the reasons he became active in the case:

> I became very interested in the case because of that infringement upon my rights, my constitutional rights of assembly and speech . . . And it really bothered me to know that I couldn't invite somebody such as an attorney or some commercial person . . . to my dorm if I so choose simply because it was college policy. (J.A. 143)

Stephanie V. Vaiano, a student association representative for a SUNY-Binghamton residence hall, testified as to why she joined as a plaintiff in the action:

> I have the right to make a decision as to who I have in my room and who I do not have in my room, whether it be for a social gathering or commercial gathering . . . And I feel that these rules are threatening my constitutional rights.
>
> . . . .
>
> I'm old enough to make my own decisions about who I have in my room, and for the college to tell me no, I cannot have such and such a person in my room is an infringement on my right to privacy, my right to be left alone. I just – I feel very threatened by the rule. (J.A. 116, 119)

The students also testified concerning the specific manner in which the regulation infringed on their rights:

Steven Gawley, President of the SUNY-Albany Student Association, testified that he believed that he "should have the right to be able to bring an attorney into my room in an attorney-client relationship." (J.A. 135). In addition, Gawley expressed a desire to speak with a job counselor in his private room. (J.A. 134)

Stephanie Vaiano testified that she wished to invite a doctor providing health information to her room and was prohibited by the regulation from doing so. (J.A. 110) Other students testified concerning their desires to invite and receive information from other invitees, including AFS, whose presence is prohibited by SUNY's total ban. (J.A. 143, 144-47, 148-49)

Residence Hall Rooms
A Student's Private Place And His/Her Campus Home

The students indicated that they consider their residence hall rooms to be their private campus homes. (J.A. 118, 132, 142, 144) They use their rooms both for rest and sleeping, and also as a place for social contacts, relaxation and personal use, in the same manner they would use a family living room at home. (J.A. 118, R. 180-82)

From the students' point of view, their rooms are the only convenient, practical and safe place where the prohibited communications can take place. They do not consider it feasible to go off campus to receive the information. One student stated, since there were "a lot of rapes going on at Binghamton, at all campuses right now, and it frightens me to think I would have to walk up to campus and back from campus when I can have [the meeting] in the privacy of my own dorm room with my friends who most likely would be living in the same area as I was." (J.A. 122)

Most SUNY campuses require all freshman, sophomores and new transfer students to live in self-sustaining college-operated housing, the cost of which is fully borne by the students. (J.A. 113, 179, 211; R. 189-90) Only students over 21 years of age, married students, students with prior military service, and students living at home with parents are exempt. (*Id.*)

SUNY permits its students to engage in a wide range of recreational activities within the residence hall rooms. These include keg parties, pranks and practical jokes, watching mindless television programs or sexually explicit films, playing loud stereo music, and commercial television presentations by multi-million dollar national advertisers. (J.A. 36, 146; R. 479-80)

As Stephanie Vaiano testified concerning her experience, the dormitory is simply not a place to study:

> Well, its our home and we use it as such. It is a little bit crazier than it would be at home, though. A lot of practical jokes go on, a lot of parties, a lot of socializing. Not much studying. We have separate facilities for that . . . But the dorm, the rooms themselves, are

> not really meant for – I mean it would be nice if you could study there, but its really kind of impossible. There is always something going on. There's always some sort of craziness going on. (J.A. 121)

In the words of another student, "most of my friends and myself study outside of the dorms, outside of our rooms, . . . the residence halls in no way shape or form that I've seen on campus exemplifies study areas." (J.A. 146).

The testimony regarding studying practices by the students was corroborated by the student handbook distributed by the University which advises students that:

> Blaring televisions and bickering statements do not a happy studier make . . . Distraction is the most common problem when you study in your room and it is a safe bet that you will accomplish absolutely nothing in your dorm. (R. 180)

SUNY guarantees the students' rights of speech and privacy within their dormitory rooms. Students are protected from invasions of privacy and arbitrary and capricious searches of their residences by the requirement that law enforcement officials seeking entry to a student's room must have a search warrant. (R. 169; Plaintiffs' Exhibit 26 at 4-6) Further, SUNY recognizes that "college students are citizens as well as members of the academic community. As citizens, students should enjoy the same freedom of speech . . . that other citizens enjoy." (*Id.*)

American Future Systems, Inc.

AFS is a corporation which at the invitation of a host and friends, demonstrates and sells cookware, china, crystal, and tableware. AFS does not engage in door-to-door solicitations, and its representatives are instructed to comply with all university regulations relating to space, occupancy, fire and safety. (J.A. 158, R. 24).

At trial, SUNY stipulated that the lawfulness or truthfulness of an AFS demonstration was irrelevant to the proceeding. (J.A. 260-61; R. 8, 524) Its counsel represented to the court that "the *truth or falsity* of what AFS does is not an issue . . . In fact, in view of the fact that the *State has a total ban* on commercial activity it may be

argued that everything that is unique about AFS' demonstration itself is not particularly pertinent here." (J.A. 260) (emphasis supplied). Notwithstanding SUNY's stipulation, a major portion of SUNY's Statement of the Case is devoted to an irrelevant discussion of "AFS and its marketing strategy."[7]

A typical AFS demonstration lasts approximately one to two hours. (R. 314) It is a "very informal gathering" where students are free to come and go as they please. (R. 24; J.A. 130, 136) The demonstration, according to an AFS representative, "is an informational program where we talk about cookware and china, crystal and tableware, talk about what to look for, what is and what is not good. We talk about pricing, talk a little bit to nutritional information. We talk about our product, our prices, our guarantees. At the end [we] give them an opportunity to go ahead and make purchases if they like." (R. 24)

Three educational experts, who viewed an AFS demonstration, testified at trial concerning the educational and informational content of such a presentation.

¶ *Dr. Marvin Wachman, Chancellor and former President of Temple University,* stated that in his view "there is an educational content to it, very definitely, compared to most of the things that go on in residence halls. I would say it is a very mild activity, it is a nondisruptive activity . . . I think this is a positive kind of activity for a residence hall." (R. 82)

¶ *Dr. Jeffrey Morris, a Political Science Professor at the University of Pennsylvania and former Special Assistant to the Vice President for Academic Affairs and Provost at Columbia University,* testified that a demonstration contains "certain informational qualities dealing with nutrition and the quality of china." (J.A. 247) In addition, a demonstration

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[7] This discussion serves no legitimate purpose and we can only assume has been inserted by SUNY's counsel to attempt to prejudice and divert the reader from the students' rights asserted.

contains certain "process qualities . . . the interchange between the students and the hostess, the interchange between the students and each other, the talking back and forth, I think there are clear educational virtues of that." (*Id.*)

¶ *Dr. Larry Krafft, Professor of Psychological Studies in Education and Psychoeducational Processes at Temple University,* observed a number of different levels of educational benefits in a demonstration. In addition, to education about the product, nutrition and energy conservation, a demonstration presented the students with a "personal kind of learning opportunity" concerning the "group in interaction . . . questions that others ask about this product or challenges that they give . . . consumer issues and choices . . . as opposed to doing those other activities totally outside the confines of what we call sometimes in a strict sense of the word classroom learning. There is within that also the issue of budgeting . . . And I might want to learn the salesman's strategy and and observe that.

. . . .

Now, in that kind of setting I'd say there is more opportunity [for educational value] than just about anywhere that I could imagine." (J.A. 263-64)

Less Extensive Regulation By The Mainstream Of State Universities

Contrary to the statements of counsel for SUNY and its amici,[8] uncontested and unrebutted record evidence conclusively establishes that SUNY's total ban runs counter to the mainstream of rules and practice of residential colleges throughout the nation. (J.A. 111, 157-59, 169-74) Those institutions, as does SUNY, ban the operation of "commercial enterprises" and ban door-to-door *un*invited solicitation, but do permit students to invite any guest, whether compensated or not, to their private rooms,

[8] See footnote 14 below.

subject only to reasonable visiting hours, registration and/or escort procedures, which are in effect on some, but by no means, all campuses. (*Id.*)[9]

Howard Diamond, Special Assistant to the Chancellor at University of Illinois, Urbana-Champaign, testified concerning his university's experience in developing a less extensive regulation that now permits students to entertain any invited guests, including those prohibited by SUNY, in their rooms subject to all other rules pertaining to visitors. (J.A. 165-176)[10] The University of Illinois, Urbana-Champaign, has had for a number of years a policy similar to SUNY's prohibiting "commercial enterprises in the residence halls." (J.A. 168) After reviewing the policy with a number of faculty, staff and students on campus, the official university policy was revised and clarified to balance "the concerns that we had as an institution involving commercialism on campus" with "policies that didn't unduly infringe on the students' rights." (J.A. 168-69)

The current policy at the University of Illinois, Urbana-Champaign instructs students as follows:

> sales representatives of commercial activities are not allowed to go door to door. Call your residence advisor or area office if you seen one in your area. However, you may invite sales representatives to your room to see you as your personal guest if your roommate agrees . . .
>
> University property cannot be used for commercial enterprises. (J.A. 170)

[9] SUNY has been aware of these less restrictive practices for over ten years. (R. 799-801) Yet it has not contacted any of the universities to inquire as to their experiences, nor has it considered implementing or experimenting with such a less extensive regulation. (J.A. 190-91, 202, 218-19).

[10] The University of Illinois, Urbana-Champaign, is a land grant institution with approximately 36,000 students. Approximately 17,000 of those students reside in university owned residence halls or certified facilities. (J.A. 166)

Mr. Diamond testified that the revised and clarified policy had successfully balanced the university's concerns about disruption and safety with the students rights and interests. "The goal of the policy as developed was to meet the needs of the campus in terms of protecting our integrity. And we feel it does that . . . Our goal is to provide an educational atmosphere and I think we do that very well." (J.A. 171-72)

Since the policy was revised and clarified, Mr. Diamond "had not heard another word from anybody, students, faculty or people in the residence halls." (J.A. 173) After inquiring, he found that "the reality was that the policy change had gone in with no problem. There has been no particular problem with enforceability and not too many people taking advantage of the policy . . . " (J.A. 173)

Dr. Marvin Wachman, former President of Temple University, also testified concerning the successful implementation of a less extensive measure at his university. (J.A. 111, R. 96-99) According to Dr. Wachman, although many state universities prohibit commercial solicitation in residence halls, "I don't know of any except this case that prohibits invited guests selling things on campus. That's been true my whole career." (J.A. 111)

Dr. Wachman also testified that he viewed SUNY's total ban as unnecessary to protect the asserted state interests in preservation of the educational mission:

> All college professors, college administrators obviously want a positive educational atmosphere in the institution, including the residence halls. No question about that.
> I am a little bit amazed at the blanket, all inclusive regulation here . . .
> I think it is impossible to enforce. I think its much too vague a principal. It isn't really defined . . . I think there is no place for disruption of activities, excessive noise, and so on.
> But I think that is a very, very broad, all inclusive kind of a ban to preserve an educational atmosphere. (J.A. 104-05)

Dr. Wachman further stated that SUNY's safety and floodgate argument was without merit. Having been over many years a professor and administrator at several colleges and universities which had check-in or escort procedures, and at others which did not, he was convinced that "the students are very well capable of handling that themselves, particularly if it is not a door-to-door solicitation kind of thing." (J.A. 107, 108) In Dr. Wachman's view, "students make very good judgments on these matters. And they are not going to let themselves be abused or exploited and other students are not going to let them do things that will impact upon them in a negative way." (J.A. 109)

The Lower Courts' Decisions

Grant Of Preliminary Injunctive Relief

On June 3, 1983, the district court preliminarily enjoined Resolution 66-156 on the ground that it infringed on the students' commercial speech rights. (J.A. 4-54) The district court utilized the standard established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). It concluded that although SUNY may have legitimate purposes for the policy, it was apparently premised on "undifferentiated fear or apprehension." (J.A. 36) Thus, there was no evidence that the "blanket prohibition" directly advanced those purposes or that the purposes could not be served as well by a more limited restriction on speech. (J.A. 36-39)

District Court's Decision On The Merits

Following a non-jury trial on the merits, the district court, on December 12, 1986, dissolved its preliminary injunction and sustained the SUNY policy. (Pet. App. lb-33b) Again the district court characterized the speech at issue as commercial speech, but eschewed the *Central Hudson* standards which it has followed at the preliminary injunction stage. (Pet. App. 20b) Instead, the district

court, believing it was bound by a recent decision of the Second Circuit, adopted the public forum analysis which it had emphatically rejected earlier in the proceedings. (*Id.*) Following that analysis, the district court concluded that a university dormitory was a "limited public forum" from which the State had reasonably excluded a particular class of speakers. (Pet. App. 24b-32b)

The district court found that the SUNY regulation constituted a "total ban" (Pet. App. 31b), which applied to "pizza vendors, AFS, doctors, lawyers and any other person or entity motivated by profits." (Pet. App. 29b) In addition, it found that there was evidence of less restrictive measures that would further the intended purposes of the ban. (Pet. App. 32b) Nevertheless, it concluded that the regulation was sustainable, since under forum analysis it need only be reasonable. (Pet. App. 30b-32b)

The Second Circuit Court of Appeals' Reversal

On appeal, the Second Circuit Court of Appeals reversed and remanded (Pet. App. 1a-20a), ruling that the "SUNY Regulation survived constitutional scrutiny below only because the First Amendment rights of students were ignored." (Pet. App. 16a)[11]

The Court held that "students who are required to live on campus and in a dormitory room should not be deprived of any rights to free speech or expression that they would have were they living off campus, absent a showing by the university that its educational mission would be materially disrupted." (Pet. App. 11a) It rejected the lowered measure of protection – mere reasonableness – afforded under the forum analysis followed by the district court, reasoning that the issue involved in the case was not a third person's right of access to State owned property, but the speech

[11] AFS did not join as a party to the appeal. It did file an amicus brief to rebut SUNY's attempts to challenge the ethics of its business pratices, an issue which SUNY had previously stipulated out of the case. (R. 65)

rights of students who have an undisputed right of access to their rooms as well as privacy rights. (Pet. App. 12a-13a)

In analyzing the constitutionality of the SUNY regulation, the Second Circuit followed the commercial speech test set forth in *Central Hudson*, 447 U.S. at 561-66. It held that the first prong of that test was not at issue since SUNY had stipulated that the speech contained lawful activity and was not misleading. (Pet. App. 14a).

It further found that the second prong of the test was met in that SUNY's interests were substantial, but noted that the district court had not determined whether there was "sufficient evidence" presented by SUNY to meet its burden of establishing that the regulation directly advanced those interests. (Pet. App. 15a) Therefore, the Court remanded the case to the district court for it to consider whether the third prong of the test had been met. (*Id.*)

The Second Circuit also questioned whether the SUNY regulation met the fourth prong of the *Central Hudson* test. (Pet. App. 16a) That prong requires that the government regulation be "no more extensive than is necessary to further [the State's] interests." *Central Hudson*, 447 U.S. at 556. The Court ruled that this element required consideration of whether there were less restrictive means available to SUNY to advance its interests, noting that the district court had found there was "support in the record for plaintiffs' position that a less restrictive measure might better balance the respective interests of the parties." (Pet. App. 16a) Accordingly, the Second Circuit also remanded the case for appropriate findings under that analysis. (*Id.*)

District Court's Decision On Remand

On remand, the district court struck down the SUNY regulation as a violation of the students' commercial speech rights. (J.A. 55-65)

The district court concluded that it need not resolve the issue of whether the regulation directly advanced the

State's interests, finding that the regulation was more extensive than necessary. (J.A. 62) In making this finding, the court noted that "plaintiffs offered expert testimony that other means, less restrictive than a total ban, had been implemented at at least one comparable university." (J.A. 62) SUNY, on the other hand, "offered no credible testimony as to why similar tailoring could not be accomplished at SUNY." (*Id.*) In addition, the court struck down interim regulations adopted at one SUNY campus as more extensive than necessary. (J.A. 64).

SUMMARY OF ARGUMENT

Initially, to set the record straight as to the facts and legal issues before this Court, it must be understood what this case *is* and is *not* about.

It is not about:

- The right of state colleges and universities to adopt reasonable rules of conduct for dormitory life.
- The right of "commercial enterprises" to "operate on" state university campuses or facilities furnished by such university.
- Nor is it about the right of uninvited third persons seeking compelled access to those portions of state university property that constitute a public or non-public forum.
- Nor is it about vendors claiming commercial speech rights "to hawk" their wares on university campuses or in student residence halls.

Rather, it is simply about:

- Student's core First Amendment rights to invite, listen and speak with others, and their rights to use their dormitory rooms – the private space furnished by the State as their home – for any lawful, safe, or non-disruptive educational, social, cultural or other exercise of free speech, free of government censorship and restraint.
- A regulation adopted by trustees of a public university which, as applied, is a total ban on students' rights to invite anyone to their dormitory rooms to speak with and listen to who receives

compensation or may make a profit from the appearance.
- A regulation as applied, so all-encompassing in its ban, that it prohibits significant educational and informational speech, including such lawful, peaceful, and nondisruptive activities by the students as speaking with career guidance counselors, tutoring, professional invitees (lawyers, doctors, stockbrokers) or any other invitee who furnishes information, or takes orders for the purchase of goods (educational or otherwise) or services.

As developed in the Argument section that follows, the students respectfully urge this Court to affirm the judgment below on any one of a number of grounds:

¶ That the regulation is *unconstitutionally vague and overbroad* since its infringement on speech impermissibly turns on a SUNY official's illogical interpretation that any student meeting with any compensated invitee constitutes the operation of a commercial enterprise.

¶ That the regulation infringes on the *students' core free speech rights* to receive information from compensated guests, including attorneys, doctors, job counselors and business invitees providing core free speech material intertwined with consumer, educational, product and price information.

¶ That even when measured by *commercial speech standards* for speakers, SUNY has failed to meet its burden of establishing that its total ban, (which runs counter to the practices of the mainstream of state universities and colleges), directly advances the asserted State interests, and is no more extensive than necessary.

ARGUMENT

I. SUNY'S BRIEF, AS SUPPLEMENTED BY ITS AMICI SUPPORT, HAS IGNORED THE STUDENTS' RIGHTS AND GROSSLY DISTORTED THE RECORD AND ISSUES BEFORE THIS COURT.

We need not repeat here the extensive discussion of the record facts set forth in the Counterstatement of the

Case, to demonstrate how counsel for SUNY and the amici in support, have grossly distorted the record and issues raised in this appeal. They simply treat the students as though they do not exist.

The fact is, as made eminently clear by the opening lines of Judge Oakes' opinion for the Second Circuit Court of Appeals, this case concerns only the constitutional rights of students to listen to invited speech within their private residence hall rooms. (Pet. App. 4a)

Further, in this regard, it should be made clear at the outset that the rights which the students advance here in no way conflict with a state university's rights, (which the students respect and encourage), to make reasonable rules of conduct for State owned and operated residence halls. This would include such rules as banning itinerant uninvited peddlers from residence halls; prohibiting students to operate an ongoing commercial business out of their rooms; as well as reasonable regulations controlling noise, visitation hours, safe occupancy, guest registration provisions, or even check-point controls, (where deemed necessary and appropriate), and the like.

But as we develop in the sections below, the State under the guise of advancing its legitimate educational mission, or protection of students' safety, cannot ignore the students' constitutionally protected speech and listening rights by imposing an arbitrary and totally unjustified ban which treats most business guests differently from social guests; or makes such unexplained exceptions as permitting pizza and soft drink vendors, or other purveyors of food or lawful beverages, linen supply, laundry, drycleaning, banking, barber and beautician services to carry on commercial operations on campus, or make unsolicited solicitations of their products or services in the students' rooms.

The regulation under attack, as amended, and as interpreted and applied, makes no sense. It is not right or fair. It violates fundamental free speech rights of the students who, as this Court has said many times, have not left their constitutionally protected rights "at the schoolhouse gate."

Despite SUNY's attempt to ignore the students and their bonafide concerns over the infringement of their free speech rights in their private space on campus, this case is not about the spurious issues raised by SUNY, and its amici, such as "public forums", "time, place and manner" restrictions, "alternative opportunities" for speech foreclosed by a total ban; nor about granting "authorization . . . to private commercial enterprises to operate" on college and university campuses.

Nor is this case about the contrived post-hoc arguments advanced by the universities and their counsel, devoid of record evidentiary support, that a university's very right to control its private property, to preserve its educational mission, and to protect the students' safety is at risk and on trial in this case. Nothing could be farther from the truth.

A. The Students' Rights At Stake.

What this case is simply about is the over reaction of lower level University administrators, who took a sensible statewide regulation that only prevents local campus officials from granting "authorization . . . to private commercial enterprises to operate" on campus, and distorted it beyond recognition to absurd overbreadth. They did this in order to defend their own outrageous conduct, as noted below, in forcibly ejecting and handcuffing one female business representative who had been invited by a student to meet with a group of interested students in her private room for a "Tupperware" type party.

The purpose of the visit by the business invitee was to respond to the genuine interest of the inviting student, and her friends, in a "one time" invitation, to learn more about nutritional cooking, quality cookware and table top accessories for family dining and entertainment (stainless steel tableware crystal, etc.,) and the opportunity to acquire such items through a "hope chest" deferred payment plan.

When the invited representative refused to leave, at the students' insistence that she stay on as their guest,

she was forcibly ejected, frisked against the wall by a male campus security guard, handcuffed, and arrested for trespass, loitering and soliciting. (J.A. 95-99)

The students and the woman representative, outraged at the way this incident had been handled by campus officials, brought suit to prevent such offensive conduct by University officials from happening again. As the case unfolded, and the University's incredibly broad interpretation of its rule became known to more students, (i.e. no visitors allowed in dormitory rooms who are paid), a number of leaders in student government and campus activities joined in this action.

Their sole interest in bringing this action was, and continues to be, to protect the constitutional rights of students against infringement by an interpretation which bans, not only the students' core free speech rights, but also their constitutional rights to receive, in the privacy of their leased space, speech about consumer products and other information in the business and professional marketplace.

B. SUNY's Contrived Defenses.

1. Alleged False and Misleading Speech.

The record below reveals that the University's first line of defense was a contention under the first prong of the commercial speech test, that the business invitees' speech was *false or misleading*.[12] When it became apparent that such a charge was totally unsupportable and utterly without merit, trial counsel for SUNY at the hearing, on September 24, 1986, abandoned this contention and stipulated this issue out of the case. (J.A. 260-61; R. 8, 60-64, 524; Pet. Br. 27)

2. Preserving the Educational Mission.

SUNY's second line of defense was, and continues to be, the assertion that permitting students to invite for

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[12] *See* Transcript of January 7, 1986 Proceeding at 23-28.

profit invitees to their rooms disturbs and interferes with the University's *"educational mission."* That contention is equally absurd, totally without merit and was not proven. (See pages 44-46 below). To the contrary, there was uncontested, unrebutted testimony by a President of a major university, and other highly qualified experts on student life, that such activities did not disturb, but rather reinforced the total educational mission of the University. (See pages 13-14 above).

3. Protecting the Safety of Students.

It was only at trial, nearly four years after the original incident, that University officials, made any effort to support their post-hoc contention, totally devoid of proof, that the justification for its total ban of all professional or commercial speech was a concern for the *safety of the students*.[13] This post-hoc "support" was trial testimony concerning the experience of one campus in permitting commercial vendors to set up outdoor booths, as at a fairground, in front of the student center.

The foregoing experience, however, took place nearly 15 years after the regulation was enacted and had absolutely nothing to do with invited speech taking place, on a one time only basis, in students' private rooms. In fact, SUNY admits that it is not aware of whether there are *any* businesses which come into a student's room only at the invitation of the student. (J.A. 205) Instead, it admittedly "only *assume[s]* there are hundreds." (R. 607) (emphasis supplied).

In addition, at trial, for the first time in the litigation, SUNY contended that allowing the students to invite compensated guests to their rooms on the same terms as other guests would somehow necessitate the installation of a checkpoint system. SUNY concedes, however, that it

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[13] *Cf.* footnote 6 above referencing the testimony of the senior SUNY official responsible for enforcing the regulation who at his deposition on November 18, 1985 viewed safety as only an "ancillary" concern.

has not "thought . . . out" whether such a system would be necessary if the policy delineated between invited and uninvited guests (J.A. 204). Moreover, SUNY did not introduce any evidence to prove why such a system is necessary for certain compensated invitees, but not for bankers, vendors and drycleaners. They are currently exempted from the regulation and may enter SUNY residence halls. Nor did SUNY attempt or succeed in justifying a premise so preposterous, on its face, as to why invited compensated guests threaten safety or should be treated differently from other guests.

C. SUNY's Misleading Advocacy.

Finally, the students pressing this action, are understandably disturbed and perplexed by the tactics of those speaking for some of the outstanding state university amici, as well as SUNY, all of which institutions the students respect greatly. These institutions, above all, in a case where *their* students' constitutional rights are at issue, should set an example of the highest standards of fair advocacy and fair dealing. Instead, in their zeal to protect their institutions against conduct *not* involved, and interests of the University *not* threatened, they have through counsel resorted to such irresponsible advocacy as:

- ¶ *Ignoring and belittling the sincerity and motivation of the student leaders* who brought this action to preserve, for all students throughout the country, such a simple and fundamental right as students' free speech. (Passim).
- ¶ *Advancing sham, and unproved contentions* that the policy of prohibiting one-on-one visits (by any invitees who may be compensated or make a profit), was justified because such visits interfere *with the academic mission of a university*. (See pages 44-46 below).
- ¶ *Misrepresenting and understating SUNY's total ban and core speech infringement*, in an apparent effort to get amicus support to protect regulations of

other institutions, (reasonably interpreted as banning only the operation of commercial enterprises on campus), that are *not* under attack.[14]

- ¶ *Presenting contrived contentions, devoid of factual support, regarding the need for checkpoint controls*, at an exaggerated estimate and undocumented expense. SUNY unjustifiably claims these costs will have to be passed on to the students in order to control an expected, but unproved concern regarding an avalanche of commercial visitors who might receive invitations from the students to visit them in their rooms. (See pages 46-48 below).
- ¶ *Contending that the restrictions here at issue are governed by "time, place and manner" concepts*, where university officials, testifying at trial, went out of their way to make clear that this was a total ban. (See pages 51-52 below).

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[14] The students find it particularly disturbing, as called to this Court's attention in the amicus brief of the Student Association of the State University of New York ("SASU"), that certain institutions, who claim as amici to have regulations or practices *similar* to the SUNY regulation, in fact, permit the very speech activity which the students here seek, i.e., the right to make their own choices as to who they wish to invite to their rooms, be they social or business invitees. (*See* SASU brief at pages 3-4). The universities according to the SASU brief who, contrary to the inferences in the SUNY and the amici briefs, permit these activities are:

University of California	Rutgers, the State University of New Jersey
Michigan State University	
University of New Hampshire	University of South Carolina
University of North Carolina	University of Vermont

Additionally, the SASU brief points out that both the University of Florida and the University of Michigan permit students to host business invitees.

¶ *Arguing, without logic or common sense, that there are for the students, "ample alternatives" to the in-person speech prohibited in their rooms,* such as: receipt of direct mail; use of the telephone; watching or listening to audio or visual presentations by mass merchandisers; or risking the safety and security of their residence hall rooms (which the University professes to place such a high priority on to protect) to go out, at night, to meet those speakers, off-campus. (See pages 52-53 below).

¶ *Advancing, for the very first time in this litigation, the totally erroneous contention that SUNY's total ban affects conduct,* not speech, when in fact SUNY stipulated at trial that its regulation prohibits the students from receiving "information." (J.A. 68) (See page 55 below).

¶ *Questioning the students' maturity and ability* to make responsible judgments concerning the manner in which they wish to use their private space and the guests which they wish to entertain. (Passim).

¶ *Refusing to acknowledge, as the law requires, that a student's residence hall room is his or her campus home* and contending instead that it is some type of a non-public forum where SUNY officials may figuratively listen through the keyhole to detect and to prohibit lawful, safe and non-disruptive activities from taking place. (See pages 48-51 below).

¶ *The perplexing and inconsistent logic of interpreting a regulation* to prevent sullying a "temple of learning" by speech from those who may make a profit, yet at the same time carving out an exception for the speech and services of bankers, beauticians and dry cleaners. (See pages 54-55 below).

II. THE REGULATION AT ISSUE IS UNCONSTITUTIONALLY VAGUE AND AN OVERBROAD PROHIBITION ON THE RIGHT OF STUDENTS TO RECEIVE INFORMATION FROM INVITED GUESTS WHO RECEIVE COMPENSATION OR MAY MAKE A PROFIT.

A. The Regulation Is Unconstitutionally Vague.

This case could turn on the common sense wording and interpretation of the challenged regulation which on its face prohibits only local campus officials from extending "authorization . . . to *commercial enterprises* to *operate* on state university campuses." (J.A. 8[illegible]) (emphasis supplied). SUNY officials, however, have rejected the common sense interpretation of the regulation, which would sensibly permit them to bar the operation of on-going commercial businesses and unsolicited peddling. Instead, to defend the outrageous conduct that precipitated this case, they turned a regulation intended to limit the authority of campus officials, into a ban on the students' rights to have private contacts with any for profit visitors. (J.A. 181) That interpretation illogically treats invited speech between a student and a speaker who may receive compensation as "the operation of a commercial enterprise." (*Id.*)

The fact that the application of the regulation depends, as this one does, on an official's strained interpretation renders it per se unenforceable and void for vagueness. *See Keyishian v. Board of Regents,* 385 U.S. 589 (1967). The text does not "provide fair warning" to the students concerning the speech prohibited. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). "[M]en [and women] of common intelligence must necessarily guess at its meaning and differ as to the application." *Keyishian,* 385 U.S. at 604. Nor does the regulation "provide explicit standards" for those who apply the laws. *Grayned,* 408 U.S. at 108. Instead it impermissibly delegates basic policy matters to campus administrative officials with the "attendant dangers of arbitrary and discriminatory application." (*Id.*)

B. The Regulation Is Unconstitutionally Overbroad.

As applied, the challenged regulation is not limited to unsolicited, disruptive, unsafe and unscrupulous speech or speakers. Rather, the ban prohibits the students from engaging in *all* speech with speakers who may receive compensation, including that which is invited, educational, informational, nondisruptive and non-exploitive. (J.A. 161-63, 181-84, 261)

Remarkably, the SUNY ban is not limited to speech taking place in the classrooms, libraries, hallways or other areas on campus where SUNY may have a legitimate interest in regulating speech. Instead, it extends into the inner sanctum of a student's campus home – an area where the State has no legitimate interest in regulating lawful, safe and non-disruptive speech. (J.A. 207)

Attempts, such as SUNY's, to arbitrarily prevent individuals from receiving certain types of information within their homes have been rejected by the Court. In *Martin v. Struthers*, 319 U.S. 141 (1943), the Court struck down a municipal ordinance forbidding any person to knock on doors distributing handbills, circulars or advertisements. The Court reasoned that the municipality's purported concern over crime did not justify the ordinance:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.
>
> The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each household the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Id. at 147.

Further, attempts such as SUNY's, to control speech based on the contention that for profit speech has no or limited constitutional protection, have routinely been rejected by this Court. Justice Blackmun summarized the Court's holdings on this issue in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976): "[I]t is clear . . . that speech does not lose its First Amendment protection because money is spent to project it . . . Speech likewise is protected even though it is carried in a form that is "sold" for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Id.* at 761 (citations omitted).[15]

Because the SUNY regulation arbitrarily focuses on compensation, rather than disruption, it substantially infringes on the constitutionally protected pure free speech and listening rights of countless students and speakers who are not before this Court.[16] Therefore, it must be stricken as unconstitutionally overbroad.[17]

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[15] To the same effect see *Murdoch v. Pennsylvania*, 319 U.S. 105 (1943); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Buckley v. Valeo*, 424 U.S. 1, 35-39 (1976).

[16] In this case, the precise meaning of the SUNY regulation is not in question, nor as developed above, that it reaches a substantial amount of First Amendment activity. Both courts below ruled, and SUNY stipulated that it prohibited students from inviting compensated speakers to their private rooms. (Pet. App. 6a, 29b; J.A. 87) The district court specifically found that the regulation applied to "doctors, lawyers, and any other person or entity motivated by profits." (Pet. App. 29b) Therefore, there is no need to remand or certify the question concerning the interpretation of the regulation. *See City of Houston v. Hill*, 107 S. Ct. 2502 (1987)

[17] A regulation will be struck down as overbroad if it "reaches a substantial amount of constitutionally protected

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Recently, in *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 107 S. Ct. 2568 (1987), the Court struck down a sweeping ban which prohibited "First Amendment activit[y]" within the airport terminal. *Id.* at 2572. The Court held that the regulation was overbroad, even if the terminal were a nonpublic forum, since it did "not merely regulate expressive activity . . . that might create problems such as congestion or the disruption of the activities of those who use [the terminal]." *Id.* The Court stated that it was "obvious that such a ban cannot be justified because no conceivable government interest would justify such an absolute prohibition of speech." *Id.*

In a similar manner, SUNY has enacted what it concedes is an absolute ban (J.A. 181, 207, 260-61), on its students' core First Amendment rights to speak with anyone, whether a fellow student or other third party invitee, who is compensated for the speech. The ban does not relate to or attempt to regulate disruptive activity and extends into the private campus home. The Constitution does not permit such arbitrary and unjustified State action.

III. SUNY'S TOTAL BAN UNCONSTITUTIONALLY INFRINGES UPON THE CORE FREE SPEECH RIGHTS OF STUDENTS TO INVITE, LISTEN AND RECEIVE INFORMATION FROM OTHERS WITHIN THEIR CAMPUS HOMES.

A. The Constitution Provides Full Protection To The First Amendment Rights Of College Students Within Their Private Campus Homes.

As is clear from the text of the challenged regulation, as well as the allegations of the amended Complaint and

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conduct." *Boos v. Barry*, 108 S. Ct. 1157, 1168 (1988). In measuring the degree of overbreadth, courts must consider the actual text, the manner in which the regulation has been construed by other courts, as well as the evidence presented concerning the application of the regulation. *City of Houston v. Hill, supra*, 107 S. Ct. at 2507 n.6; *Boos*, 108 S. Ct. at 1168.

the evidence presented at trial, this case involves far more than even the rights of the student plaintiffs to receive information from one *particular* business invitee. Rather, the case involves the rights of the named plaintiffs to participate within their private homes in the very universe of expressive activity at the campuses they attend.

Under the Constitution, these college students are every bit as mature and responsible as any other adult citizen. They are eligible to be drafted and serve in our nation's armed services, responsible to pay taxes, and granted the right to vote. Even more fundamentally, they are "persons" under the fifth and fourteenth amendments. Thus, they are entitled to the highest degree of protection the Constitution has to offer.[18]

The fact that the students are enrolled at state colleges or universities does not lower the degree of constitutional protection afforded their rights, nor can they be forced by the State, by contract or otherwise, to waive them. This Court has repeatedly stated that even high school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 567 (1988) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)).[19]

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[18] Even SUNY recognizes that "[c]ollege students are citizens as well as members of the academic community. As citizens, students should enjoy the same freedom of speech . . . that other citizens enjoy." (R. 169; Plaintiff's Exhibit 26 at 5-6).

[19] This tenet is particularly true with respect to students on college campuses. As Justice Powell noted in *Healey v. James*, 408 U.S 169 (1972): "Colleges and universities are not enclaves immune from the sweep of the First Amendment . . . . the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses

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Likewise, the fact that the students may reside, whether by choice or compulsion, in private rooms within University residence halls, or that the speech rights at issue are exercised within those private rooms, does not alter this analysis. Under New York law, a college student's private room is the constitutional equivalent of one's home. *See People v. Cohen*, 57 Misc. 2d 366, 292 N.Y.S. 2d 706, 713, *aff'd*, 61 Misc. 2d 858, 306 N.Y.S. 2d 788 (1969)("The dorm is a home . . . To suggest a student who lives off campus in a boarding house is protected, but that one who occupies a dormitory room waives his [or her] constitutional liberties is at war with reason, logic and law.") Thus, the speech taking place there is worthy of greater, rather than lesser, protection.

As Justice O'Connor recently noted in *Frisby v. Schultz*, 108 S. Ct. 2495 (1988):

> Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick" and have recognized that "preserving the sanctity of the home, the one retreat from which men and woman can repair to escape from the tribulations of their daily pursuits," is surely an important value.

Id. at 2502 (citation omitted).[20]

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than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " *Id.* at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

[20] *See also United States v. Orito*, 413 U.S. 139, 142 (1980) ("It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.")

B. Students Have Constitutionally Protected Rights To Listen To And Receive Information From Invited In-Person Speech. Those Rights Are Entitled To The Highest Level Of Protection Afforded Core Speech.

One of the constitutional rights enjoyed by students within their campus homes is the right to receive information. This right is of vital importance to the students' participation in society.

This Court has affirmed the First Amendment right to receive information in a variety of contexts including the right to receive political publications from abroad;[21] mail from prison inmates;[22] commercial advertising;[23] pornographic materials;[24] religious literature;[25] information from labor organizers;[26] and unsolicited handbills.[27]

The right to receive information is particularly important at colleges and universities which, perhaps more than anywhere else, are the marketplace of ideas. *See Widmar v. Vincent*, 454 U.S. 263, 267 (1981). College and university campuses traditionally have been dedicated to creating an atmosphere fostering student exposure to the widest possible range of ideas and information. "Scholarship cannot flourish in an atmosphere of suspicion and distrust . . . [S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our

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[21] *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[22] *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974).

[23] *Virginia Pharmacy, supra*, 425 U.S. at 756-57.

[24] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[25] *Marsh v. Alabama*, 326 U.S. 501, 505 (1946).

[26] *Thomas v. Collins*, 323 U.S. 516 (1945).

[27] *Martin v. Struthers, supra*, 319 U.S. at 143.

civilization will stagnate and die." *Sweezey v. New Hampshire*, 354 U.S. 234, 250 (1957).[28]

This Court has explicitly held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). Similarly, in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), the Court noted that the right to receive information is explicitly guaranteed by the Constitution, in two senses:

> *First*, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . "It would be a barren marketplace if ideas had only sellers and no buyers."
>
> *More importantly*, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech.

457 U.S. at 867 (citation omitted) (emphasis supplied). Thus, the students' rights to receive information are not subsidiary to, nor contingent upon the rights of speakers to provide the information.[29]

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[28] Even SUNY has reaffirmed these constitutional principles noting that "[a]cademic institutions exist for the transmission of knowledge, the pursuit of truth, the development of the student and the general well-being of the development of the student and the general well-being of society. Students have become increasingly aware that learning is a broad process whose boundaries extend beyond the classroom . . . [A]chievement of the established goal of this university can only come with the acknowledgement of the continued need for learning among all members of the community . . . ." (J.A. 254)

[29] A number of preeminent commentators have concluded that the *right to receive information* is the *sole*, or at least *principal*, basis for the constitutional protection afforded by the First Amendment. *See* Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245; P. Freund, *The Supreme Court of the United States* 81 (1961); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 26 (1971).

Once focus is properly placed on the students' rights as invitors to receive information, it is evident that pure free speech issues are involved in this case. This is so because if one looks at invited speech from the listener's perspective only, the listener's motivation controls. Since this is an area where neither the State nor the Court has a right to probe, the content becomes irrelevant. Accordingly, all invited one-on-one speech is presumed to reach, and must be afforded, the same high level of protection as is afforded core speech.

This Court has never defined commercial speech to include invited communication which has significant educational content *intertwined* with that portion of the speech which tends to promote the sale of goods and services.

Justice Stevens has frequently addressed the dangers of over-inclusion in defining commercial speech:

> Because "commercial speech" is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.

Id. at 579 (Stevens, J., concurring); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring).

Recently, this Court adopted this very line of analysis in *Riley v. National Fed'n of the Blind of N.C.*, 108 S. Ct. 2667 (1988), where it struck down a State restriction on the charitable solicitation of funds. There the Court held that speech intertwined with both commercial and non-commercial elements must be treated as fully protected speech:

> [W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech
>
> . . . .
>
> Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel

> out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for *fully protected* expression.

Id. at 2677 (emphasis supplied).

To characterize the information the students in this case are prohibited from receiving as anything other than core free speech calls into question the First Amendment protection afforded to almost any form of self-expression of learning. The record reveals that the students wish to receive information from a broad range of professional visitors,[30] and also to attend and participate in an AFS presentation, for purely noncommercial reasons.[31] Furthermore, substantial and uncontroverted evidence was presented by several students, as well as a number of educational experts, including a former university President, concerning the significant informational and educational content involved.[32]

The intertwining of these significant non-commercial factors sets the invited speech at issue apart from the category of *unsolicited* commercial speech, defined by this Court as "speech which 'does no more than propose

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[30] See pages 6-7 above.

[31] Some attend merely to learn about the products offered or about planning for the future. (J.A. 132-33, 146) Others host or attend purely as a social activity, out of curiosity, or for the pure fun of it, or to learn first-hand about sales technique. (J.A. 148-49)

[32] For example, an AFS demonstration provides information, not only about products, but also about nutrition, cooking, credit and long range budgetary planning. It requires students to think about non-academic, personal priorities and provides them with an opportunity to make important choices of their own. Similarly, a student learns from the comments, questions and judgments of his peers, both during and after the demonstration. (J.A. 247, 263-64; R. 24, 82)

a commercial transaction.' " *Virginia Pharmacy, supra,* 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376, 385 (1973)).

C. SUNY Has Failed To Meet Its Burden To Prove That Its Regulation Is Narrowly Tailored To Serve A Compelling State Interest.

To justify an infringement upon the students' core free speech rights, SUNY must demonstrate, (which it has not), by record evidence, that the challenged regulation is "narrowly tailored . . . to serve a compelling state interest." *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535 (1980).

To satisfy this exacting standard, SUNY was required to produce evidence of demonstrable harm from the prohibited speech. "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." *Tinker, supra,* 393 U.S. at 508. (See also discussion below in Section IV B at pages 41-43 below).

SUNY did not and cannot carry this burden:

- The regulation is not narrowly tailored to further the educational mission since it prohibits the very type of educational and informational dialogue the first amendment is intended to protect. (J.A. 133, 163, 181-84, 261)
- Moreover, the regulation is not narrowly tailored to prevent disruption in that it prohibits activity which is nondisruptive, safe and non-exploitive. (J.A. 162-63, 258)
- Just as importantly, there is no evidence supporting SUNY's contention that invited compensated guests must be treated differently from other invited guests. (J.A. 162-63, 204)[33]

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[33] See also discussion at pages 43-48 below.

IV. SUNY'S TOTAL BAN CONSTITUTES AN UNCONSTITUTIONAL INFRINGEMENT UPON THE STUDENTS' SPEECH RIGHTS EVEN WHEN MEASURED BY COMMERCIAL SPEECH STANDARDS.

If the students' rights as invitors, to listen to presentations by business invitees, are to be measured by commercial speech standards, (a premise the students do not advance), the challenged regulation still is a violation of their first amendment rights to receive information within the privacy of their campus homes.

This Court, in extending first amendment protection to commercial speech has recognized that the listener's interest in the free flow of information is "substantial" and may "often be far keener than his [or her] concern for urgent political dialogue." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).[34] In addition, the Court has acknowledged, as it has for core speech, that significant societal interests are served by commercial speech. Advertising frequently concerns "significant issues of the day" and performs an "indispensable role in the allocation of resources within a free enterprise system." (*Id.*)[35]

As set forth below, SUNY's total ban fails three of the four elements of the commercial speech standard established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

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[34] *Cf.* Pet. Br. at 18-19 where it seeks to belittle and demean the value of protecting marketplace information about "pots and pans."

[35] *See also Virginia Pharmacy, supra*, 425 U.S. at 763, 765; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Value of Free Expression*, 39 Geo. Wash. L. Rev. 429, 432-47 (1970); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1, 42-43 n. 146 (1976).

A. SUNY Concedes, As It Must, That The Speech At Issue Is Lawful And Not Misleading.

Under the commercial speech standard, the speech at issue is clearly entitled to protection since it is lawful and *not* misleading. In fact, SUNY has so stipulated. (J.A. 260-61; R.8, 60-64, 524)[36]

B. SUNY Has The Burden To Prove By Record Evidence That Its Infringement On Speech Directly Advances The Asserted Interests And Is No More Extensive Than Necessary. A Blanket Ban Can Not Meet This Requirement.

As both courts below correctly ruled, this Court's decisions require SUNY, in order to justify its infringement on speech, to produce record evidence proving that the regulation *directly* advances its asserted interests in educational mission and safety. (Pet. App. 14a; J.A. 36-38) *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 641 (1985). Similarly, this Court's decisions also establish that the burden is on SUNY to prove that the regulation is no more extensive than necessary.[37]

As for the quantum of evidence required to meet these burdens, it is clear that mere speculation or conjecture; "undifferentiated fear or apprehension";[38]

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[36] Therefore, questions concerning the manner or dangers of in-person communication or solicitation, or the need to prevent fraud, so critical to the Court's determinations in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 444, 464-65 1978), and *Friedman v. Rogers*, 440 U.S. 1, 13 (1979), are not involved here.

[37] *See Central Hudson*, 447 U.S. at 571 (State is required to make "a showing that more limited speech regulation would be ineffective"); *In re R.M.J.*, 455 U.S. 191, 206 (1982) (striking down a prohibition on attorney advertising on the ground that there was "no indication and the record of the failed effort to proceed along . . . a less restrictive path.")

[38] *Tinker, supra*, 393 U.S. at 508.

"unsupported assertions;"[39] or "fears" and "assumptions"[40] will not suffice. Rather, the State must produce "evidence or authority",[41] to support a "finding that engaging in the forbidden conduct would materially and substantially interfere" with the asserted goals. *Tinker, supra*, 393 U.S. at 509.[42]

Additionally, blanket bans on speech have uniformly failed this evidentiary requirement under the commercial speech standard. As noted in *Central Hudson*, "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n.9. The Court there ruled that a total ban on promotional advertising was more extensive than necessary to further the State's interest in energy conservation since the regulation reached "all promotional advertising regardless of the impact of the touted service on overall energy use . . . [and] no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest." 447 U.S. at 570.

Likewise, in *Zauderer, supra*, the Court struck down a blanket ban on attorney advertising noting that "no where does the State cite any evidence or authority of any kind for its contention that potential abuses . . . cannot be combatted by any means short of a blanket ban." 471 U.S. at 648.

Most recently in *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988), the Court expressly granted certiorari to

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[39] *Zauderer, supra*, 471 U.S. at 648.

[40] *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

[41] *Zauderer, supra*, 471 U.S. at 648.

[42] *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1981) (Borough failed to introduce evidence that the challenged restriction was necessary to advance its objectives"); *Linmark, supra*, 431 U.S. at 95-96 (lack of record evidence to establish ordinance advanced objectives).

resolve whether "a blanket prohibition [on targeted, direct-mail solicitation by lawyers for pecuniary gain] is consistent with the First Amendment," *id.* at 1920, and concluded that "opportunities for isolated abuses for mistakes [did] not justify a total ban on that mode of protected commercial speech." *Id.* at 1923.[43]

C. SUNY Has Failed To Meet Its Burden Of Establishing By Record Evidence That Its Total Ban Directly Advances Its Asserted Interests And Is No More Extensive Than Necessary.

Respectfully, this case does not turn, as SUNY and its supporting amici would have the Court believe, on the question of whether there are differences between the various formulations of the commercial speech standard announced by the Court.[44] Regardless of the particular formulation employed, SUNY has failed to prove by record evidence that the regulation at issue here directly advances the asserted interests, and to establish that it is no more extensive than necessary.

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[43] Petitioners attempt to minimize these cases on the grounds that they involve attorney advertising. (Pet. Br. 25-26) That distinction, however, supports the students' position since the State is permitted greater latitude in regulating attorney advertising than advertising relating to consumer products. *See Shapero, supra*, 108 S. Ct. at 1925 (O'Connor, J., dissenting).

[44] Over the years, the Court has described the "no more extensive than necessary" element of the commercial speech standard in various ways, including whether the rule is the "least restrictive possible means," *Zauderer, supra*, 471 U.S. at 644; whether the State can regulate abuses through "less restrictive and more precise means," *Shapero, supra*, 108 S. Ct. at 1923; *In re R.M.J., supra*, 455 U.S. at 206; *Central Hudson*, 447 U.S. at 565, 570; and whether the restriction is "narrowly drawn". *Central Hudson*, 447 U.S. at 565; *In re R.M.J., supra*, 455 U.S. at 203.

SUNY has been challenged concerning the need to present evidence in support of the ban on several occasions throughout this litigation:

• In granting a preliminary injunction, the district court ruled that SUNY's view "that the restriction is all that stands between the students and a flood of distracting commercialism has simply not been substantiated." (J.A. 36) The court concluded that "[b]ecause the rule appears premised upon 'an undifferentiated fear or apprehension of disturbance rather than a demonstrable harm', it does not withstand the rigorous scrutiny the First Amendment warrants." (J.A. 36-37)

• Again at trial, SUNY was challenged in this regard. In his opening statement, counsel for the plaintiffs, described the charter of the trial and challenged SUNY to "come forward with evidentiary support" or "hard evidence." (R. 11) As stressed below, SUNY utterly failed to do so.

• Finally, in remanding the case, the court of appeals again noted that the burden is on the state "not merely to assert that it has a substantial interest but to demonstrate that interest by real evidence." (Pet. App. 14a)

Although SUNY asserted a number of interests, chiefly the preservation of the educational mission and safety, it has failed to meet the challenge each time.

1. SUNY Has Failed To Establish That The Ban On Compensated Speech Is Necessary To Protect Its Educational Mission.

SUNY offered no evidence that its regulation banning compensated speakers advances or preserves its educational mission. Rather, it agrees that learning is a broad process whose boundaries extend beyond the *classroom*, i.e. into the real life maturing experiences of dormitory life. This is not an issue in contention. (Pet. Br. 3)

SUNY, as was its burden, did not rebut the undisputed evidence that students principally use their residence hall rooms, not for studying, or academic pursuits,

but for sleeping, recreation, and such other uses as they would use their living room in their own home; and (2) that there are far more disturbances of the educational mission permitted or tolerated in the residence halls than any of the activities prohibited by the ban. (See pages 11-12 above).

In fact, the record reveals that the prohibited invitees are quiet and dignified, in direct contrast to the noisy, boisterous, or disruptive activities routinely tolerated in the residence halls, or the wide range of commercial operations that are allowed on campus including the residence halls, such as pizza vendors, etc. (*See id.*; Pet. Br. 5)

SUNY's reliance on the shop-worn testimony by Dr. O'Leary regarding the alleged chaos on a campus overrun with vendors (which he stated he found on assuming his present position as President) (see pages 8-9 above) does not constitute evidence of demonstrable harm to support the total ban that precludes invited speech in campus dormitory rooms. Even the district court did not credit such testimony as having any relevance on the issue of disruption or safety in the *residence halls*, since all this testimony related solely to the unique "podium policy" at the Albany campus of permitting students and third party vendors to set up outdoor booths, as at a fairground, in front of the *campus center* (far distant from the residence halls). (J.A. 221-22)

Furthermore, SUNY did not rebut the evidence at trial regarding the practices at most major colleges and universities that, while banning door-to-door peddlers and the operation of commercial businesses by students or third parties in residence halls, they do freely permit invited commercial and professional third parties to visit students' rooms on the same terms as social guests. (J.A. 111, 157-59, 169-74) The record reflects that such rules have been successfully implemented and adequately protect the State's interests. (*Id.*) The universities following

such practices have experienced no problems whatsoever. (*Id.*)[45]

Finally, defendants conceded at trial that they had no studies or empirical evidence to justify their alleged "floodgate" argument. (J.A. 188, 202, 219, 236) This is so, notwithstanding that for over 10 years, the SUNY officials were aware of the practices at the majority of state universities permitting invited commercial and professional guests in student's rooms. (J.A. 218-19)

Despite the compelling evidence of reasonableness and that this practice worked well for the "mainstream," SUNY woodenly turned its back on trying to justify its rule or work out an accommodation with the students. It never made any effort to experiment or collect its own data, or to secure the same from others, from which to make a reasoned, fair and intelligent decision based on facts and experience, not conjecture. (J.A. 191, 202, 204, 218-19, 236)

2. SUNY Has Failed To Establish That The Ban On Compensated Speech Is Necessary For Safety.

As developed in Section I above (outlining the history of SUNY's contrived defenses, see pages 21-28), SUNY's retreat to the student safety contention came only after it had abandoned its "false or misleading speech" position.[46] SUNY's post-hoc speculation and

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[45] Because the record indicates that there is a less extensive measure that fully protects the State's interests, this case does not turn on the question of whether an imaginative lawyer or judge is able to "come up with something a little less 'drastic' or a little less 'restrictive'," *Central Hudson*, 447 U.S. at 600 (Rhenquist, J., dissenting) (quoting *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)). *Cf. Harnish v. Mantee County, Fla.*, 783 F.2d 1535, 1540 (11th Cir. 1986) (commercial speech test requires evidence that less restrictive means are available).

[46] *Cf.* footnote 6 discussing the November 18, 1985 testimony of the senior SUNY official responsible for enforcing the regulation that safety was only an "ancillary" concern.

conjecture regarding the need for a "central checkpoint" to preserve safety is based almost entirely on the same discredited testimony by Dr. O'Leary regarding the campus center "podium policy," (as supplemented by the testimony of other college administrators), devoid of any empirical data or studies, and based only on pure conjecture as to what "could" happen.

This is patently evident from the testimony of Dr. Pogue who admitted that SUNY had "not made a study" or "thought . . . out" whether a central checkpoint would be necessary if SUNY "made a distinction between the invited guest and the uninvited third party who comes and seeks to knock on doors randomly within the faculty." (J.A. 203-04)

In addition, the spurious nature of SUNY's contention concerning the alleged need for such a procedure is clear from the fact that a significant number of SUNY campuses already have such checkpoint procedures in place and yet the total ban is applicable even there. (R. 510, 48; Plaintiff's Exhibit 22 at 36)

In fact, the only hard evidence presented at trial concerning the safety issue was by plaintiffs/respondents and not rebutted: For example, Mr. Diamond indicated that the University of Illinois, Urbana-Champaign, had successfully implemented a less extensive regulation without any safety problems. (J.A. 171-74) All safety problems were dealt with by the simple, no cost requirement that "anybody who is not living in the residence halls be escorted by faculty, staff or students." (J.A. 176) Others testified that there were a number of other universities which permitted students freely to invite compensated guests to their rooms, without checkpoint, or even sign in or escort procedures. (R. 326-27)

Finally, perhaps the most telling evidence of the contrived nature of SUNY's argument concerning the need for such systems is evident from the exceptions to the regulation for bankers, vendors and drycleaners. SUNY did not attempt, nor could it succeed in explaining why checkpoint controls are *not* necessary for these preferred

speakers, but would be necessary for other less privileged business invitees.

In sum, SUNY has failed to establish that its total ban directly advances its asserted interests and is *no* more extensive than necessary. The record is silent as to why invited compensated guests should be treated differently from other invited guests. In addition, the record fails to justify or explain why:

- the regulation bans students from communicating with invited guests, as well as door to door solicitation and the operation of a business;
- the regulation bans speech which furthers the educational mission, as well as that which may have no direct relation to formal education per se;
- the regulation bans speech which is non-disruptive, safe, and non-exploitive, as well as that which is not; and
- the regulation prohibits speech taking place within a student's private campus home.

V. SUNY'S TOTAL BAN IS NOT SUSTAINABLE UNDER PUBLIC FORUM OR TIME, PLACE AND MANNER ANALYSIS.

A. Public Forum Analysis Has No Place In A Case Of Invited Speech Within Students' Homes.

Once the focus is properly placed on the students' rights at issue, it is obvious that *forum* analysis, as advanced by SUNY and its amici as their principal contention to lower the degree of first amendment scrutiny to mere reasonableness, is not the proper measure of the constitutionality of the SUNY regulation. As the court below cogently observed, that form of analysis is used only to gauge *third parties'* rights of access to public property. (Pet. App. 12a-13a). It is totally inapposite in a case such as this, which involves the rights of students to receive information within their *private campus rooms*, space which they control and on terms set by the invitor, not the invitee.

Under a forum analysis, as advanced by SUNY, a private dormitory room, (the student's campus home),

becomes relegated to the absurd designation of public, quasi-public or non-public fora where the State is permitted to curtail expressive conduct in the interests of free traffic flow, public safety, etc. Experience and common sense tell us that a student's private room is the antithesis of such areas in that:

- students need and have a right to private space, their home away from home.
- students have a property interest in such space;
- the State is only acting as landlord with respect to such space;
- the State frequently compels students (usually first year) to live in such space;
- the room is the student's home; and
- the State in this very case has, as the Constitution obligates it to do, recognized and agreed to respect the students' constitutional rights to the space they lease.

Clearly, forum analysis was never meant to apply to a regulation on invited speech taking place within such a unique and highly protected area as a student's home. This Court has sensibly limited forum analysis to cases involving a third party's right of compelled access to government property to engage in conduct inconsistent with the property's intended purposes.[47]

Three recent decisions by this Court highlight the inapplicability of forum analysis here on the same rationale. In *Airport Comm'rs of Los Angeles v. Jews for Jesus,*

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[47] In *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), the Court noted that in order for public forum analysis to be utilized "[a]s an initial matter a speaker must seek access to public property." *Id.* at 801.

Likewise, in *Tinker*, the Court rejected forum analysis on the ground the case involved "the constitutional rights of [students] entitled to be [on the property]." 393 U.S. at 512 n.6. *See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49-51 n.9 (1983) (distinguishing nonaccess cases); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 539-40 (1980) (rejecting public forum analysis in cases involving utility's right to use its own property for speech purposes).

Inc., supra, in striking down a blanket ban on first amendment activity within an airport terminal, the Court noted, without resolving, that "at least one commentator contends that [forum analysis] does not control a case . . . in which the [speakers] already have access to the [forum]." 107 S.Ct. 2571.[48]

In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), the Court utilized forum analysis to analyze a ban on individuals seeking access to public streets to engage in residential picketing. Questioning the applicability of the forum analysis *outside* that context, Justice O'Connor stated: "[S]ince our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to . . . hypotheticals [involving invited speech] remains open question." *Id.* at 2504.[49]

Finally, in *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), the Court ruled that forum analysis was appropriately followed in a case involving high school students' rights to gain access to publish articles in a school owned newspaper. The Court expressly held that

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[48] The commentator to which the Court referred states:

> *public forum analysis is irrelevant when access is not at issue.* When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech. The Court's requirement that the school show a material and substantial interference with the educational function is addressed to that question.

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 N.W.L. Rev. 1, 48 (1986)(emphasis supplied).

[49] The specific hypotheticals referred to concerned: (1) a particular resident's use of his or her home as a place of business or public meeting, (2) picketers present at a particular home by invitation of the resident.

forum analysis would be inappropriate outside that context in a case involving "educators' ability to silence a student's personal expression that happens to occur on the school's premises." *Id.* at. 569.

In this case, the students merely seek to use their campus homes to receive information from invitees of their choosing. They do not seek access, nor do they need to, to any area in which they are entitled to be. Speech occurring within such a private area, at the request of the student, does not bear the imprimatur of the University. Therefore, forum analysis used solely to measure access to public property, is inappropriate in a case such as this.

B. Time, Place And Manner Analysis Has No Place In A Case Where There Is A Total Ban On Invited Speech Taking Place Within A Student's Private Home.

Equally misplaced is SUNY's absurd contention that its total ban may withstand constitutional scrutiny as merely a time, place and manner restriction on its students' speech.

The regulation at issue is in no sense a time, place and manner restriction:

- ¶ It does not regulate the *hours or time* during which a student may receive information from invited compensated guests, but precludes students from engaging in such communications altogether.
- ¶ It does not regulate the *manner* in which students may invite or speak with compensated guests, but totally prohibits communications from taking place.
- ¶ *Finally,* it does not regulate the *place* where such speech may occur, but bans the speech from taking place *anywhere* on campus.[50]

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[50] SUNY attempts to analogize its ban to that sustained by the Court in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). In that case, however, the State did not impose a total ban but merely limited speakers to fixed

(Continued on following page)

Moreover, as with forum analysis, time, place and manner analysis is inapposite in a case such as this dealing with invited speech taking place within a student's private home. Clearly, "if the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley, supra*, 394 U.S. at 565. *A fortiori* it also means that the State may not in the guise of a time, place and manner regulation prevent college students in their private campus homes from participating in lawful, safe and non-disruptive first amendment activities.

C. The SUNY Regulation Unconstitutionally Fails To Leave Open Ample Alternative Channels Of Communication.

SUNY, to demonstrate that its total ban on speech is constitutional, must, under both public forum analysis and time, place and manner analysis, establish that *"ample alternative channels of communication"* are available to the students.[51] It has not done so.

Throughout this litigation, SUNY representatives have touted the regulation as a "total ban." (J.A. 260) Therefore, it is not surprising that at trial SUNY presented no evidence concerning alternative locations where the prohibited speech could take place. Quite simply, this is because the SUNY regulation is a total, campus wide ban. Reasonably adequate and safe facilities are not available, and have not been made so by SUNY. (J.A. 207)

(Continued from previous page)

locations on a state fairgrounds. *Id.* at 655 n. 16. In this case, SUNY has banned the speech on its entire campus and has not provided any alternative locations. (J.A. 207)

[51] *See Cornelius, supra*, 473 U.S. at 809; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); *Perry, supra*, 460 U.S. at 53-54.

SUNY's contrived post-hoc suggestion that students can listen to the radio or television is absurd, and not a reasonable, realistic or ample alternative. It totally ignores the student's right to a face to face discussion. Its argument that a student can leave his or her campus home to meet with an invitee off campus is even more bizarre. For this increases the very threat to safety that SUNY claims it wishes to reduce. (J.A. 122) Most importantly, mandating the use of an alternative location may prevent a student from participating in an activity in which he or she may otherwise wish to be involved. (*Id.*)[52]

Given that the rights asserted here are not those of the speaker, but the rights of the listener to receive information, the suggested "alternatives" are even more unsatisfactory. A student has no control over the media, to compel it to furnish the information he or she wants, nor free access to off campus sites.[53] Thus, the fact remains that SUNY has not offered to provide, or offered any evidence that it does provide, any alternatives, let alone ample alternatives.

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[52] This Court has frequently noted that "one is not to have the exercise of his liberty expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 69-70 n.18 (1983); *Schad v. Borough of Mount Ephraim*, 452 U.S. 74, 76-77 (1981). Consequently, the Court has rejected similar "alternatives" to those suggested by SUNY. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516 (1981); *Linmark, supra*, 431 U.S. at 91.

[53] *See Virginia Pharmacy, supra*, 425 U.S. at 757 n. 15 ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.")

D. The SUNY Regulation Is Unconstitutionally Content Based.

Furthermore, to demonstrate that its regulation is constitutional, SUNY, under both forum analysis and time, place and manner analysis, must demonstrate that the ban is viewpoint and content neutral.[54]

The regulation is not viewpoint neutral, and applicable to all speech, regardless of content. Rather, it forbids any speech containing commercial content or any speech from one who is paid or may make a profit from the visit. *See, e.g., Bolger, supra,* 463 U.S. at 69-70 n.18.

Further, the regulation does not apply to all communication with *all* compensated speakers. Rather, it differentiates among them, containing a number of exceptions for speakers that SUNY, based on a content judgment, presumably approves of, such as banks, beauticians and laundry services. *See, e.g., Metromedia, supra,* 453 U.S. at 517.[55]

SUNY has displayed a puzzling and totally inconsistent bias against certain compensated speakers, almost as though it feels there is something inherently evil or disruptive in sullying a temple of learning with activities by those who may profit from their labors. The students disagree.

Accordingly, "[w]hatever may be the bounds of time, place and manner restrictions on commercial speech, they are plainly exceeded by this . . . statute, which singles out

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[54] See *Cornelius, supra,* 473 U.S. at 811; *Consolidated Edison, supra,* 447 U.S. at 536.

[55] Although the need to prevent disruption may appear to be a neutral justification for the regulation, it is simply a facade for content and viewpoint based discrimination. There is no evidence that compensated guests are more disruptive than other guests, nor any evidence to justify why bankers, beauticians or dry cleaners should be preferred above other prohibited activities. *See, e.g., Cornelius, supra,* 473 U.S. at 812. Moreover, by SUNY's own admission, the regulation does not draw a line based on disruption. (J.A. 162-63).

speech of a particular content and seeks to prevent its dissemination completely." *Virginia Pharmacy, supra,* 425 U.S. at 771.

VI. SUNY'S TOTAL BAN IS NOT SUSTAINABLE AS A RESTRICTION ON CONDUCT WITH AN INCIDENTAL EFFECT ON SPEECH.

For the first time in this litigation, SUNY has attempted to repackage its regulation as a restriction on conduct or activity. This Court should not consider, nor accept this belated effort, not only because it is out of time, but because it is wrong.[56]

In *Buckley v. Valeo,* 424 U.S. 1 (1976), this Court specifically rejected the argument now advanced by SUNY, where it held that a regulation limiting contributions to political campaigns was not a mere limitation on conduct, but was a clear infringement on speech. Pointing out that the expenditure of money cannot be equated with such conduct as destruction of a draft card, the Court went on to say: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment." *Id.* at 16.

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[56] SUNY's "eleventh hour" attempt to lower the degree of First Amendment scrutiny was not made at trial, on appeal, nor in its petition for certiorari. In fact, at trial, SUNY expressly stipulated that the regulation prohibits students from inviting in to their dormitory rooms third parties "which furnish *information*." (J.A. 87) (emphasis supplied). Consequently, it is not a proper subject for this Court's review. *See California v. Taylor,* 353 U.S. 553, 557 n.2 (1957).

CONCLUSION

For the foregoing reasons, respondents respectfully request that the judgment of the Court of Appeals for the Second Circuit be affirmed.

Respectfully submitted,

HENRY T. REATH
(Counsel of Record)
WAYNE A. MACK, JR.
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6347

Counsel for Respondents

REPLY

BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

No. 87-2013

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

against

TODD FOX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, New York 12224
Telephone (518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
LAWRENCE S. KAHN
Deputy Solicitors General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel

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UNITED STATES CONSTITUTION:

Article III 4, 7

First Amendment 7

IN THE

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OCTOBER TERM, 1988

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Except for the challenge to SUNY's refusal to permit in-person AFS demonstrations on SUNY campuses, the constitutional violations alleged by respondents are not properly before the Court.

At no point in their brief do respondents address the issue actually decided by the court below. The Second Circuit concluded as it did solely because it held correctly that AFS presentations are commercial speech[1] (13a),[2] but incorrectly that government regulation of commercial speech must be the "least restrictive means" of accomplishing such regulation (13a, 15a-16a). Respondents make no attempt to defend this untenable position. Rather, they focus on various other examples of speech supposedly prohibited by Resolution 66-156. These examples, they claim, render the regulation both overbroad and invalid as applied to such "pure" speech.[3] These other examples, however, are not properly before the Court. Because they are hypothetical, and SUNY's supposed denial of them has caused plaintiffs no injury of any sort, plaintiffs lack standing to raise them directly. Moreover, determinations of whether a particular instance of speech is "commercial" are profoundly fact-specific. Plaintiffs' sketchy hypothetical examples of speech by anyone other than AFS are irrelevant to the obvious and only necessary conclusion, fully supported by the record in the district court, that AFS demonstrations are commercial speech and regulable as such.

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[1]This reply brief assumes, solely for the sake of argument, that AFS presentations and the other examples given by respondents are "speech". In fact, as argued in petitioners' main brief (pp 39-47), they can more plausibly be viewed as conduct.

[2]The decision of the Court of Appeals is reproduced in the appendix to the petition for certiorari, cited here by the page number followed by "a". References to "JA" are to the Joint Appendix.

[3]Respondents also attempt to argue that AFS presentations themselves are noncommercial speech (Br, p 38). Petitioners address this contention fully in their main brief (pp 18-19, n. 7).

A. Plaintiffs lack standing to raise instances of alleged constitutional deprivations other than AFS demonstrations.

In order to have standing to bring suit, a plaintiff must establish that there is "a 'case or controversy' between himself and the defendant within the meaning of Art. III" of the Constitution. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This means that a court must ask whether "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf". *Id.* (emphasis in original) (*quoting Baker v. Carr*, 369 U.S. 186, 204 [1962]). There is no question that plaintiffs have established a "personal stake" sufficient to give them standing to challenge SUNY's unwillingness to permit them to host or attend AFS demonstrations. Plaintiffs, however, insist on more. They claim standing to challenge an assortment of other alleged infringements attributable to the SUNY regulation. With respect to these other infringements, plaintiffs' stake is altogether abstract, hypothetical and conjectural. Plaintiffs' interest in these matters is not immediate enough to give them standing, and the issues they raise are extraneous to the case.

The Court must ask, in connection with any challenge to a plaintiff's standing, whether "the injury [alleged by plaintiff is] too abstract, or otherwise not appropriate, to be considered judicially cognizable". *Allen v. Wright*, 468 U.S. 737, 752 (1984). "The injury alleged must be, for example, 'distinct and palpable', [*quoting Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)], and not 'abstract' or 'conjectural' or 'hypothetical', [*quoting Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)]." *Id.* at 751.

Plaintiffs must "identify [a] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (emphasis in original). In other words, Article III requires that plaintiffs assert more than "the generalized interest of all citizens in constitutional governance". *Id.* at 482.

Although this case arose from and involves only SUNY's unwillingness to permit AFS to hawk its wares on campus, plaintiffs attempt to fight their battle on different ground. They repeatedly allude (Br, pp 7, 21) to SUNY's interpretation of Resolution 66-156 as prohibiting not only product demonstrations, but also on-campus consultations with doctors, lawyers, stockbrokers and job counselors when these activities are conducted in exchange for or in contemplation of a profit. Plaintiffs can, however, point to no specific episode involving anyone but AFS in which the SUNY regulation operated to deprive SUNY students of speech they wished to receive. More significantly, none of the six plaintiffs who testified at trial indicated that he or she suffered any injury other than the deprivation experienced as a result of being unable to attend AFS presentations in dormitory rooms. An examination of the self-described "personal stake" of these plaintiffs reveals it as far too attenuated, abstract and hypothetical to give them standing to challenge any other alleged deprivation supposedly attributable to Resolution 66-156.

Stephanie V. Vaiano stated that "I feel that these rules are threatening my constitutional rights", and that "I'm old enough to make my own decisions about who I have in my room, and for the college to tell me no, I cannot have such

and such a person in my room is an infringement on my right to privacy, my right to be left alone. I just—I feel very threatened by the rule" (JA116, 119).[4] Stephen Gawley was questioned with respect to his desire to entertain specific speakers in his room. With regard to job counseling, he opined that "I think it's a service, something that possibly I wouldn't I'd want [*sic*] to get top quality advice, you know about a future career, about a job" (JA134). Of meeting with a stockbroker, he indicated that it "would be something that I would be interested in doing, you know, and if so interested I would want to be able to do that" (JA133). Of consulting with a lawyer, he stated only that "I should have the right to be able to bring an attorney into my room in an attorney-client relationship" (JA135).

The other four student witnesses evinced interests in the case that were, if possible, even more conjectural than those of Vaiano and Gawley. Edward R. Detweiler objected to the regulation solely because it supposedly "infringes on my right of speech" (JA142). James B. Cullen entered the case because "it really bothered me to know that I couldn't invite somebody such as an attorney * * * to my dorm if I so choose simply because it was college policy" (JA143).[5] He was "kind of offended" by and "didn't appreciate" SUNY's policy (JA143). Philip J. Botwinik indicated that "I feel the

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[4]Respondents' statement that Ms. "Vaiano testified that she wished to invite a doctor providing health information to her room and was prohibited by the regulation from doing so (JA 110) [*sic*]" (Br, p 10) is inaccurate. Her testimony in this area concerned only activity in which she "might" wish to engage (JA119). Similarly, the next sentence in respondents' brief, "Other students testified concerning their desires to invite and receive information from other invitees, including AFS . . . (JA143, 144-147, 148-149)" (Br, p 10), is seriously misleading. AFS was the *only* "invitee" which the students who testified at the referenced pages expressed an actual desire to invite.

[5]Plaintiffs (Br, p 10) incorrectly attribute Cullen's words to Detweiler.

right to be able to do whatever I want within my own room is very important", and that it is "an injustice" that he may not entertain an insurance salesman, attorney or job counselor in his room (JA144-145). Jeffrey Zellan stated that he "simply felt that I should be able to invite guests that I choose to invite" (JA150).[6]

There is nothing in the foregoing statements to suggest that plaintiffs have standing to challenge any aspect of the SUNY regulation other than its interpretation to deny permission to host or attend AFS presentations. Standing, as this Court has said, "is not measured by the intensity of the litigant's interest". *Valley Forge*, 454 U.S. at 485. Rather, a "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct". *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (*quoting Massachusetts v. Mellon*, 262 U.S. 447, 488 [1923]). It is not enough to claim, as Gawley does, that the prohibited conduct is something in which one might "possibly" be interested in engaging. Nor is it sufficient to state, as Vaiano does, that one "feel[s] very threatened" by the regulation. Even more obviously, the mere fact that one believes that a regulation generally "infringes" on one's rights, or that one is "really bothered" by "an injustice" will not impart standing. This is especially so where, as here, there is no evidence whatsoever that plaintiffs or other SUNY students face any adverse disciplinary (let alone penal) consequences from enforcement of the regulation to prohibit AFS demonstrations or anything else. *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff had standing when he was likely

[6]The deposition of a seventh plaintiff, Christine M. Odell, was admitted into evidence at trial. Her testimony resembled that of the other plaintiffs. She entered the lawsuit, she testified, to vindicate "the overall concept of students' rights [that] I thought was at stake" (Odell Depo. p. 10).

to face criminal prosecution for exercise of First Amendment rights).

AFS commenced this case to challenge SUNY's unwillingness to permit it to conduct demonstrations on campus. Despite AFS's efforts to redraft the complaint in order to take, in respondents' words, "a backseat in the litigation" (Br., p. 4), neither of the courts below has shown the slightest disposition to regard the case as involving any deprivation suffered by plaintiffs beyond the immediate one arising from denial of AFS presentations. Nor can any of the plaintiffs allege some actual or immediately-threatened injury as a result of SUNY's interpretation of Resolution 66-156. Because "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party", *Warth*, 422 U.S. at 498, plaintiffs may not invoke that power to challenge the application of the SUNY regulation to bar dormitory visits by anyone but AFS.

B. Plaintiffs' effort to raise hypothetical questions concerning speech other than that of AFS is merely an attempt to introduce to the case issues unnecessary to its resolution and insufficiently developed in the record.

This case, it is necessary once more to observe, began with and still involves only SUNY's unwillingness to permit AFS's product demonstrations on its campuses. Neither the district court nor the court of appeals treated this case as a facial challenge to Resolution 66-156. AFS was, of course, a party in the district court. The bulk of plaintiffs' case was devoted to describing and defending AFS practices. Both courts below agreed that the communication the students wish to receive is commercial speech (13a). Neither court was moved to consider speech other than that associated with AFS presentations in reaching its conclusions. The reason for this is clear: courts concentrate on the cases

actually before them, rather than chimerical or theoretical matters not directly in controversy. Presumably because the AFS presentations the students seek to receive are unquestionably commercial speech, and thus properly subject to the SUNY regulation, plaintiffs' argument concentrates on other hypothetical instances of purportedly "noncommercial" speech subject to the SUNY regulation. Plaintiffs argue incorrectly that the Court may consider these examples by means of "overbreadth" analysis.[7] Even if it were

[7]In their brief (pp 30-32), respondents claim for the first time in this litigation that the regulation is "overbroad" in the technical sense of the term: that is, that it "substantially abridges the First Amendment rights of other parties not before the court". *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). A party may not raise on appeal an overbreadth claim never presented in the courts below. *See Kahn v. United States*, 753 F.2d 1208, 1222 n. 8 (3d Cir. 1985); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986). Even if it were permissible to make the contention at this late date, the claim must be rejected where, as here, the challenged regulation involves conduct and not merely speech. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462 n. 20 (1978). More importantly, the contention is meritless because it is well established that ordinarily the overbreadth doctrine does not apply to commercial speech. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, ____ U.S. ____, 107 S. Ct. 2971, 2981 n. 15 (1987); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 565 n. 8 (1980); *Ohralik*, 436 U.S. at 462 n. 20 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381 (1977). Resolution 66-156 is, by its terms, directed at the operation of "private commercial enterprises" on SUNY campuses. It is hardly the kind of regulation about which there could be a legitimate fear that "its very existence may cause others not before the court to refrain from constitutionally protected speech or expression". *Broadrick*, 413 U.S. at 612. *See also, Bates*, 433 U.S. at 380. Because the justification for the use of overbreadth analysis is absent, this case does not present an occasion for the Court to extend the overbreadth doctrine in order to reach a regulation which is aimed at the operation of for-profit enterprises on public university campuses. See *Bates*, 433 U.S. at 380.

(Footnote continued on following page)

proper in principle to consider such examples, the specific indicia which determine whether any given utterance is "commercial" or "pure" speech are so manifold and synergistic that the Court should follow the courts below in confining its analysis to the regulation as actually applied to AFS demonstrations rather than as theoretically employed to permit or prohibit speech by anyone else.

As this Court has noted, "the precise bounds of the category of expression that may be termed commercial speech" are "subject to doubt". *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). Although there is a "common-sense distinction between speech proposing a commercial transaction * * * and other varieties of speech", *Central Hudson*, 447 U.S. at 562, that distinction has proved difficult to define apart from individual examples of speech. However, factors that inform that determination can be identified.

For example, a speaker's purpose or motive is relevant to the process of identifying commercial speech. *In re Primus*, 436 U.S. 412, 438 n. 32 (1978). Solicitation by lawyers

(Footnote continued.)

Although the overbreadth doctrine may be employed to invalidate a statute which may constitutionally be applied to the party before the Court, *see New York v. Ferber*, 458 U.S. 747, 767 (1982), the same is not true of vagueness. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others". *Hoffman Estates*, 455 U.S. at 495. Moreover, to succeed in a vagueness challenge to a statute on its face, "the complainant must demonstrate that the law is impermissibly vague in all its applications". *Id.* at 497. Thus, plaintiffs' perfunctory vagueness challenge (Br, p 29) cannot be sustained. First, the prohibition against the operation of private commercial enterprises on campus clearly extends to AFS operations, attendance at which of course is the only proscribed conduct in which plaintiffs have attempted to engage. Moreover, even plaintiffs argue (Br, p 29) that there is a "common sense interpretation of the regulation", one which they claim to find "sensibl[e]". Thus, it can scarcely be contended that the law is vague in all its applications.

undertaken for the purpose of pecuniary gain has traditionally been viewed as a form of commercial solicitation. *See Ohralik*, 436 U.S. at 462 n. 20. On the other hand, the fact that a speaker "has an economic motivation" for speech "would clearly be insufficient by itself to turn [his utterance] into commercial speech". *Bolger v. Youngs Drugs Products Corp.*, 463 U.S. 60, 67 (1983). Similarly, the "core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction'." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 [1973]). However, the mere fact that a given utterance is conceded to be an advertisement does not compel the conclusion that it is commercial speech. *Bolger*, 463 U.S. at 66.

Bolger and Zauderer indicate that a determination as to whether speech is commercial must be made only after close inquiry into both the speech itself and its context. Thus, in *Zauderer*, this Court noted that an attorney's printed advertising contained "statements regarding the legal rights of persons injured by the Dalkon Shield [intrauterine device] that, in another context, would be fully protected speech. That this is so does not alter the status of the advertisements as commercial speech". 471 U.S. at 637 n. 6. Similarly, in *Bolger*, the Court examined, *inter alia*, an eight-page pamphlet on venereal disease issued by a condom manufacturer. The pamphlet identified the manufacturer only once, at the bottom of the last page. 463 U.S. at 63 n. 4. Nonetheless, this and other pamphlets "constitute[d] commercial speech notwithstanding the fact that they contain discussions of important public issues". *Id.* at 67-68. Because "[a] company has the full panoply of protections available to its direct comments on public issues, * * * there is no reason for providing similar constitutional

protection when such statements are made in the context of commercial transactions". *Id.* at 68. The "combination" of the facts that the pamphlets were advertisements, that they referred to a specific product, and that the speaker had an economic motivation marked them as commercial speech. *Id.* at 67.

Thus, as *Bolger* suggests, a determination of whether a given utterance is commercial speech requires a fact-based examination of content (*e.g.* reference to a specific product), context (*e.g.* the pamphlet's identity as an advertisement) and motivation. Indeed, *Zauderer* states that the same statement will be commercial speech in one context and noncommercial speech "in another".

The testimony of SUNY officials reflects this need for consideration of nuance. It cannot be gainsaid that speakers appear on SUNY campuses regularly and receive compensation, usually in the form of honoraria. A stockbroker seeking to earn a commission may not give investment advice to students in their dormitory rooms (Hosteter Depo. pp. 22-23). But the same stockbroker may come to a SUNY campus for a fee and make the same statements "in the context of . . . business courses and educational contacts" without running afoul of the regulation. (Hosteter Depo. p. 23). Similarly, an attorney who for a fee counsels students in their dormitory room on their "legal rights" is on a different footing from an attorney who makes the same presentation and receives an honorarium as part of a residence hall program (JA182).

Where a given instance of speech belongs on the continuum of "pure" and commercial speech is, thus, a question requiring a fact-based inquiry. No one factor is determinative, though many are relevant. It cannot be adequately answered in response to sketchy, context-barren, hypothetical questions of the sort posed by plaintiffs' counsel.

Nor did the courts below feel any need to address these hypothetical questions. Both courts realized that the case involved AFS presentations alone. The bulk of the proof in the district court involved AFS's attempts to demonstrate the nature and merit of its presentations and SUNY's efforts to explain its treatment of AFS. The record contained a superabundance of evidence permitting both courts to conclude, with minimal discussion, that AFS presentations unquestionably "propose a commercial transaction" (13a) and as such are within the core notion of commercial speech. Any other hypothetical examples of commercial or noncommercial speech to which the regulation might or might not extend were more abstract than concrete, simply because the case at no point required that they be fleshed out. The case did not involve lawyers, doctors, stockbrockers or any commercial invitee other than AFS.

The need to confine judicial determinations to concrete controversies with fully-developed factual records, rather than extending them to resolution of abstract constitutional questions, is no more than another dimension of the standing requirements discussed in the preceding section. The constitutional requirement of standing "tends to assure that the legal questions presented to the Court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action". *Valley Forge*, 454 U.S. at 472. Plaintiffs' overbreadth argument is no more than an effort to divert attention from the question of the rightful place of AFS demonstrations of pots and pans in an academic community to abstract, hypothetical matters that this Court, like the courts below, need not consider to decide this case.

Dated: Albany, New York
January 19, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
LAWRENCE S. KAHN
Deputy Solicitors General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel

AMICUS CURIAE

BRIEF

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TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER SIDE

MARSHA S. BERZON
177 Post Street, 3rd Floor
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2013

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

v.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER SIDE

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international labor organizations with a total membership of approximately 13,000,000 working men and women, is filed with the consent of the parties, as provided for in the Rules of the Court.

ARGUMENT

Introduction and Summary of Argument

According to the lower courts, and to the parties, the result in this case turns upon the doctrinal prism through which the controversy is viewed: The district court ap-

plied this Court's cases concerning communicative activity on government-owned property, and concluded that a state university dormitory is "a public forum for non-commercial activities . . . [and] a non-public forum for commercial activities." 649 F. Supp. 1393, 1401 (N.D.N.Y., 1986). Because the district court viewed the relevant location as a "non-public forum" for commercial activities, the pertinent standard of review, under this Court's analysis applicable to non-public fora, is whether the regulation of speech is "viewpoint neutral and reasonable in relation to the forum's purposes." 649 F. Supp. at 1401, relying on *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985). Under this standard, the district court concluded that SUNY's regulation of commercial activities in dormitories is valid because the regulation applies equally to all commercial activities by nonstudents, and is reasonably related to the University's interest in preventing "commercialization of the campus, which would detract from its educational environment." 649 F. Supp. at 1402.

The court of appeals, on the other hand, maintained that this case "involves [not] the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights." 841 F.2d 1207, 1213 (C.A. 2, 1988).[1] Therefore, said

[1] The court of appeals suggested that the appropriate line of analysis may have *changed* between the district court's decision and that of the court of appeals because the housewares company that sought to make presentations to university students in their dormitory rooms did not participate at the appellate level. Consequently, said the court of appeals, "the case *no longer* involves an effort by outsiders to gain access to university property; rather it concerns only the constitutional rights of students in their dormitories." 841 F.2d at 1208 (emphasis supplied).

Although the parties to the case changed on appeal, however, the *issues* did not: Both in the district court and on appeal, the

the court of appeals, "the public forum cases thought applicable by the district court are inapposite." *Id.* Instead, according to the court of appeals, the relevant line of cases is that dealing with the constitutional protection accorded to commercial speech. Under those cases, the relevant standard is whether the speech in question, first,

> concerns lawful activity and [is] not . . . misleading. Second, we must ask whether the asserted governmental interest is substantial. Then, we must determine whether the Regulation directly advances

case concerned whether the University could bar nonstudents with a commercial motive from speaking to students in the students' dormitory rooms. In deciding this question, a court is to consider the First Amendment interests of both speakers and listeners, regardless of who the particular parties before the court may be, and the government interests that pertain to both the speakers and the listeners:

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. *The Constitution often protects interests broader than those of the party seeking their vindication.* The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute under review] abridges expression that the First Amendment was meant to protect. [*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (emphasis supplied)].

See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563 (1980) (in a case in which only the company that wished to speak, and not the recipients of the speech, were parties, noting that "[t]he First Amendment's concern for commercial speech is based on the information function of advertising", and concluding that the regulation in question was indeed invalid because it impeded that function without adequate justification); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (noting again that "the First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides", regardless of whether the speaker or the consumers are the parties before the court.)

> the governmental interest asserted and whether it is no more extensive than is necessary to advance that interest. *Posadas* [*de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341 (1986]; *Central Hudson*, 447 U.S. at 566 . . . [841 F.2d at 1213.]

Applying this standard, the court of appeals concluded that a remand was in order, since the district court had determined only that the University's regulation was reasonably related to the University's educational purposes, and had not decided whether those purposes "could be served as well by a more limited restriction on commercial speech." *Central Hudson*, 447 U.S. at 564.

Reading these opinions, it would appear that the degree of deference due to the University's policy decisions, and therefore the outcome of the case, will turn entirely upon which one of a number of independent, competing First Amendment doctrines is determined to govern here. That conception of the First Amendment and of its jurisprudence is troubling enough in itself. But of equal concern the court of appeals approach leads to the anomalous conclusion that the First Amendment is *more* protective of commercial communication, even when conducted on government-owned property, than of communication within the core of the First Amendment's protections conducted on government-owned property.

On a more objective and comprehensive analysis, of course, this case *both* involves commercial speech (at least in part),[2] *and* concerns the government's right to control the use of its property. Put another way, the case would be quite a different one if it involved *either* (1) a university ban *solely* on political meetings to which students invite one or more nonstudents (assuming that the university generally permits dormitory residents to invite

[2] *See* pp. 8-9, *infra*.

nonstudents to their rooms for general social purposes),[3] *or* (2) a city ordinance forbidding private citizens to initiate meetings in their own homes with a commercial vendor.[4]

1. Before proceeding to examine, in Parts II and II, *infra*, the intersection between governmental property

[3] As a general matter, the posture of this case, as we understand it, is that respondents are *not* challenging any dormitory regulation *other than the one* forbidding nonstudent invitees to "operate" a "private commercial enterprise[]". 841 F.2d at 1209; Br. Opp. at 5-6.

For example, the University does impose in a few dormitories limitations upon visiting hours, and generally requires registration of guests at certain times. 841 F.2d at 1209. Respondents do not claim the right to violate such rules, and for purposes of this case we may assume that any communicative activity must comply with such rules. Nor do respondents challenge the authority of universities to ban generally door-to-door solicitation of dormitory rooms, although it is unclear whether the University has a rule specifically forbidding such solicitation, separate from the regulation here at issue.

In the same vein, we would expect that if a university enacted uniformly applied rules forbidding the gathering of more than a certain number of individuals in a dormitory room, regulating noise levels in dormitory rooms, or requiring the concurrence of roommates before guests could be entertained, such rules would be enforceable with respect to communicative activity by both students and nonstudents in the dormitory rooms.

In short, the question in this case is whether and to what degree a university (or, more expansive, any governmental entity) may single out communicative activity in government-owned and controlled locations for *special, more stringent prohibitions*, and whether the communication is simply part of a business transaction, or, instead, is speech entitled to full First Amendment protection.

[4] For reasons we explain later (at pp. 14-29), we regard the constitutional protection accorded to the hypothetical political meeting as quite clear under this Court's cases, while the First Amendment protection accorded commercial transactions in private residential locations is an open question, and one that need not be decided in this case.

regulation and free speech doctrine that is at the heart of this case, we pause in Part I, *infra*, to consider whether, on the present record, the University's regulation must be invalidated regardless of the rules that govern communication at that intersection. Specifically, it appears that the regulation here may reach communicative activity that is *not* simply commercial speech within the meaning of this Court's cases; indeed, respondents argue that the regulation does so. That circumstance raises the question whether the regulation is invalid insofar as its reach extends beyond commercial speech, and whether, if so, the regulation should be invalidated pursuant to the First Amendment overbreadth doctrine even if the regulation would be valid if applied solely to commercial speech. We suggest in Part I, *infra*, that since the courts below did not determine whether the regulation does reach beyond commercial speech, and since the outcome of this case might well vary depending upon whether or not speech entitled to full First Amendment protection is within the regulation's reach, it would be appropriate either to certify the question of the proper interpretation of the regulation to the New York Court of Appeals under 1988 New York Rules of Court § 500.17, or remand the case to the lower federal courts for determination of that question without deciding the constitutional issues presented by the parties.

2. In Part II, *infra* we proceed on the premise that the Court has rejected the option presented in Part I, and has determined that the regulation does in fact bring within its purview speech that goes further than simply proposing a business transaction. As we show in Part II, *infra*, the validity of such a regulation cannot sensibly be determined simply by labelling the dormitories in question a nonpublic forum or a limited public forum. Where, as here, (1) the putative speaker is not seeking a special right of access to government property, (2) the communicative activity is fully compatible with other activity at the location, and (3) there is no sense in which the

putative speaker is asking the government to facilitate his/her communication rather than simply to remain neutral as between communicative and other activity, the tripartite forum paradigm should *not* be applied at all. Rather, as has been done in other recent cases, the judicial task is to apply the general rules stated in *Tinker v. Des Moines Independent Comm. Sch. Dist*, 393 U.S. 503 (1969). Those rules take the *specific* governmental interest in use or control of particular kinds of public property directly into account, but do not defer to the governmental interest in unfettered control over property where the result is to relegate communicative activity to a *lesser* status than otherwise similar noncommunicative activity, contrary to the First Amendment's dictates.

3. In Part III, *infra*, we entertain the opposite supposition from that upon which we proceed in Part III: We assume that this Court determines either that the University regulation only reaches commercial speech, or that only the application of the regulation to commercial speech is currently before the Court. As we show, not since *Valentine v. Chrestensen*, 316 U.S. 52 (1942), has the Court directly addressed the extent of the government's authority to control *commercial* activity, with its concomitant speech aspects, on *government-owned property*. *Valentine* has been read as resting on the Court's view, since repudiated, that commercial speech is totally unprotected under the First Amendment. On a fair rereading however, *Valentine* reflects, instead, the conclusion that the government's authority to bar use *of public facilities* for commercial purposes necessarily includes the authority to bar communication that is part and parcel of the commercial endeavor. At any rate, the reasons for subjecting exclusion of communicative activity fully protected by the First Amendment from public facilities to careful judicial review, addressed in Part II, do not pertain with respect to commercial speech. That being so, the government's authority to exclude purely commercial activity, including commercial speech,

from public property dedicated to noncommercial purposes is broad, and includes the prerogative to enact and enforce the regulation here in question with respect to communicative activity that is simply part of a business transaction.

I. Because the Courts Below Did Not Determine Whether the University Regulation Forbidding "Private Commercial Enterprises" to "Operate" on State University Campuses Precludes Communications Other than Those That Propose a Business Transaction, the Case Should be Remanded for a Definitive Construction of the "Commercial Enterprises" Regulation.

The incident that immediately gave rise to this case involved a sale presentation on cookware, china and tableware by a business corporation, American Future Systems, Inc. ("AFS") to a group of students in one student's dormitory room. The University determined that this sales presentation, which concluded with the *actual consummation of sales*, violated a SUNY regulation providing that:

> No authorization will be given to private commercial enterprises to operate on State University campuses or facilities furnished by the University other than to provide for [certain services].[5]

The district court concluded, quite correctly, that the speech aspect of AFS's activity is, fundamentally, "speech proposing a commercial transaction" (*Va. Pharmacy Bd. v. Va. Consumer Counsel*, 425 U.S. 748, 762 (1976)) and, as such, "commercial speech . . . afforded . . . a limited measure of portection, commensurate with its subordinate position in the scale of First Amendment values," (*Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). The court of appeals agreed with this conclusion. 841 F.2d at 1213. At least in their brief in opposition to the petition for writ of certiorari, respondents do not take issue with the court's characterization of the AFS sales presentation.

[5] This provision is hereafter referred to as "the commercial enterprises regulation" or "the regulation."

Respondents do argue, however, that the regulation goes further and would also reach, e.g., all situations in which an invitee to a dormitory room " 'furnish[es] information [or] provide[s] a product or service where the end result is the intent to make a profit by the invitee.' " Respondents' Brief in Opposition (Br. Opp.) at 4. *quoting* Record at 187-88; *see also* 841 F.2d at 1209 ("[t]he parties stipulated that the [regulation] prevents SUNY students from inviting into their dormitory rooms commercial enterprises or persons who furnish information, provide a product, or provide a service where a fee is charged or a profit involved"). In particular, according to certain University officials, "included within the class of speakers which the students are prohibited from inviting and communicating with are lawyers, women's health physicians, job counselors, stockbrokers, student tutors, and untold others. (Record at 113-15, 373-77, 485-87)." Br. Opp. at 5.

This Court's cases make clear that the determination whether particular speech is commercial speech, entitled to limited First Amendment protection, or speech entitled to full First Amendment protection, is often a fine-tuned one, depending upon the precise nature of the communications in question, and not simply upon the identity or motivation of the speaker. Thus, if, indeed, the governing criteria under the University's regulation is simply whether an invitee will profit financially by communicative activity, that regulation may well reach speech entitled to full First Amendment protection.

For example, the category of commercial speech is generally limited to "speech proposing a commercial transaction" (*Ohralik v. Ohio State Bar Ass'n, supra*, 436 U.S. at 455-56) and does *not* include every form of economi-

cally-motivated speech, (*New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964); *First National Bank of Boston, supra*). Thus, substantive advice on her rights provided by a lawyer engaged by a student (Br. Opp. 4) may well be fully protected First Amendment speech, even where the lawyer is being paid a salary or an hourly fee for providing the advice. *Cf. United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971); *Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964); *Ohralik, supra*, 436 U.S. at 458-59. At the same time, however, "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component" and is therefore "a subject only marginally affected with First Amendment concerns," *Ohralik, supra*, 436 U.S. at 457-59.

For reasons we develop later (Part II, *infra*), the University's regulation here at issue may therefore well be invalid insofar as the regulation goes beyond commercial speech activity and reaches speech activity entitled to full First Amendment protection complying with all University rules regarding access to dormitories by visitors and behavior of visitors and students in dormitories. The question then arises whether the regulation must be voided under this Court's First Amendment overbreadth doctrine even though the AES presentation involved purely commercial speech, and even though there is no indication in the record that the regulation has ever been applied in fact to any speech other than commercial speech.

As this Court has had reason to note several times recently,

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). A statute may be invalidated on its face, however, over if the overbreadth is 'substantial.' *Houston v. Hill*, — U.S. —, — 107 S. Ct. —, — (1987). *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, "manifestly, strong medicine". [*Airport Commissioners of Los Angeles v. Jews for Jesus*, — U.S. —, 107 S. Ct. 2568, 2571-72 (1987)).

See also Virginia v. American Booksellers Ass'n, Inc., — U.S. —, 108 S. Ct. 636, 642 (1988); *Boos v. Barry*, — U.S. —, 108 S. Ct. 1157, 1168-69 (1988).[6]

"In addressing . . . a facial overbreadth challenge, a court's first task is to ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct." *Boos v. Barry*, 108 S. Ct. at 1168. In performing this task, the courts "consider the actual text of the statute as well as any limiting constructions that have been developed." *Id.* And where the lower courts have not addressed the question whether the statute in fact reaches "a substantial amount of constitutionally

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[6] Generally, "overbreadth analysis applies weakly, if at all in the ordinary commercial context," because commercial speech is not susceptible to being silenced by overbroad regulation, and because an advertiser "can determine more readily than others whether his speech is truthful and protected." *Bates v. State Bar of Arizona*, 433 U.S. 350, 351 (1977). In this instance, however, the overbreadth problem inheres in the fact that the University regulation may reach the core First Amendment speech the overbreadth doctrine is designed to protect. Thus, it is irrelevant in the present context that commercial speech is also covered by the regulation and is the kind of communication that is directly before this Court on the facts of this case.

protected conduct," or where their conclusion seems for one reason or another unreliable, this Court has on some occasions certified the statutory construction question to state courts that will accept such certification requests (*Virginia v. American Booksellers Ass'n, Inc.*, 108 S. Ct. at 643-44), and, on at least one occasion, itself construed the statute so as to avoid a constitutional challenge (*Frisby v. Schultz*, — U.S. —, 108 S. Ct. 2495, 2500-01 (1988)). In determining whether a statute or regulation is subject to a narrowing interpretation that avoids First Amendment overbreadth problems, moreover, the views of the attorney representing the governmental entity are informative but not authoritative. *Virginia v. American Booksellers Ass'n, Inc.*, 108 S. Ct. at 644; *cf. Frisby v. Schultz*, 108 S. Ct. at 2501 (first adopting a narrowing construction of the statute in question, and then noting that that interpretation "is *supported* by the representations of counsel for the town at oral argument" (emphasis supplied); *id.* at 2505 (White, J., concurring) (counsel's representations are not "authoritative statements of the law").

In this instance, the regulation on its face prohibits only the "operat[ion]" of commercial enterprises on campus. One would not ordinarily consider that a lawyer or doctor or tutor who consults with clients at the clients' places of residence is "operating" his or her business at the clients' residences. Rather, the business "operates" from its own office, but offers as part of its services (consultations) at a place convenient for clients. Thus, it seems unlikely that either students seeking to engage for-profit consultants whose services include fully protected First Amendment speech or consultants seeking to offer such services would, on the basis of the regulatory language alone, fear that the university regulation here at issue is directed at them, and be deterred from engaging in protected activity for that reason. Nor is there any indication that the regulation has

indeed been invoked by the University with respect to any activity other than the proposing or consummation of a business transaction *simpliciter*.

Nonetheless, as noted, the record in this case does contain a broad construction of the regulation in question by some University officials; under that construction, the regulation would reach beyond commercial communications. The record also contains the fairly vague stipulation by counsel alluded to above, which could be read as interpreting the regulation to reach *any* reimbursed service, even that involving fully protected speech.[7] And neither court below expressly addressed the question of whether or not the regulation on its face reaches beyond commercial speech, and, if so, whether the regulation affects a substantial amount of such core First Amendment speech; rather, each court addressed only the appropriate characterization of the AFS sales presentations.

Under these circumstances, it would appear that the best course would be for this Court either to certify the question of the proper interpretation of the commercial enterprises regulation to the New York Court of Appeals, or remand to the courts below for determination of both the theoretical reach of the regulation and the practical likelihood that the regulation will deter a substantial amount of constitutionally protected speech.

A state court certification process, such as that used in *Virginia v. American Booksellers Ass'n, Inc., supra*, is available in New York. 1988 New York Rules of Court § 500.17. Alternatively, federal courts have the authority to adopt a narrowing construction of a state statute or regulation where "such construction is reasonable and readily apparent." *Boos v. Barry*, 108 S. Ct.

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[7] The stipulation standing alone, although broad, could be read as applying only to services without any pure First Amendment component.

at 1168; *Frisby v. Schultz*, 108 S. Ct. at 2501 (adopting a narrowing construction to which the ordinance in question is "readily subject"). Moreover, this Court "ordinarily defer[s] to lower court constructions of state statutes" (*id.*), rather than construing state enactments itself in the first instance. Finally, resolution of the pertinent questions concerning the proper statutory construction and the likely practical effect of such a construction could well involve the need to develop a record which is best done at the district court level. *Cf. Virginia v. American Booksellers Ass'n, Inc.*, 108 S. Ct. at 643-44, (stressing the need for "reliable evidence in the record" supporting a broad statutory interpretation).

Once the New York court or the lower federal courts provide an authoritative interpretation of the regulation in question and provide some indication of the degree to which communicative activities at the core of the First Amendment occurring in student dormitories are likely to be affected by the regulation, the Court will be in a better position to adjudicate the constitutional questions presented in this case, and to determine the validity of the commercial enterprises regulation as applied to SUNY dormitories.

II. As Applied to Speech Fully Protected by the First Amendment, the Commercial Enterprises Regulation Unconstitutionally Denies Individuals Lawfully Using Governmental Property the Right to Engage in Communicative Activity Fully Compatible With the Noncommunicative Activity Permitted at the Same Location.

For purposes of this section, we assume that the option suggested in Part I, *supra*, is not adopted by the Court, and that the Court instead views the commercial enterprises regulation as reaching *all* communicative activities by a nonstudent in a SUNY dormitory involving remuneration, and not simply communication that proposes,

or is an integral part of, a business transaction. As we have already explained (pp. 9-10, *supra*), so construed, the regulation would reach not only commercial speech but also speech fully protected by the First Amendment. And insofar as it reached the latter kind of speech,[8] the regulation would be unconstitutional.

1. In recent years, this Court has sometimes approached the question whether government may regulate speech fully protected by the First Amendment upon property the government owns or controls through a tripartite forum topology:

> [T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are those places which "by long tradition or by government fiat have been devoted to assembly and debate." [*Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)]. . . . In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain subjects. . . . Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. [*Cornelius v. NAACP Legal Defense & Ed. Fund*, *supra*, 473 U.S. at 802-43].

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[8] For simplicity sake, in this section we refer to speech fully protected by the First Amendment as "fully protected speech". It is worth noting once again in this regard that for First Amendment purposes it is irrelevant whether particular communicative activity is economically motivated, as long as the communication is in form and content "expression that the First Amendment was meant to protect." *First National Bank of Boston*, *supra*, 435 U.S. at 776. Thus, the question presented by a ban under the commercial enterprises regulation reaching fully protected, albeit economically motivated, speech is analytically identical to the constitutional question that would be presented by a university ban upon political meetings in dormitories.

"Public property which is not by tradition or design a forum for public communication and which is governed by different rules" (*Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)), "is a nonpublic forum" (*Cornelius, supra*, 473 U.S. at 804). The "State may reserve the nonpublic forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn.*, 460 U.S. at 46.

The district court held in this case that "dormitory rooms do not fit easily into either the public forum or non-public forum classifications" (649 F. Supp. at 1401), but nonetheless sought to analyze the problem presented by applying the tripartite forum typology. That court concluded, on the basis of extensive testimony, "that the dormitories have been used for a variety of social, cultural, and educational activities", and that the University had "created a public forum [in the dormitories] for non-commercial activities, while maintaining a non-public forum for commercial activities." *Id.* at 1401. While we agree with the result the district court reached with respect to fully protected speech,[9] it is our

[9] As this Court noted in another case concerning fully protected First Amendment activity on a university campus, "where government creates a forum for expressive activity, it assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Thus, "[t]he Constitution forbids a State to enforce certain exclusions from forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68. In particular, "[i]n order to justify discriminatory exclusion from a public forum based on the . . . . content of a group's intended speech, the University must . . . show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 278; *see also Perry Educ. Assn., supra*, 460 U.S. at 46.

submission that in a case of this kind rote incantation of the tripartite forum typology impedes rather than advances a reasoned consideration of the First Amendment question presented.

2. As the Court has noted, the tripartite forum typology is only "a workable analytical tool" (*City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n. 32 (1984); it is a "means of determining when the Government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes," (*Cornelius, supra*, 473 U.S. at 800). In effect, the tripartite forum typology simply states in a shorthand fashion the *result* reached through a process that entails the careful weighing of First Amendment interests in a certain class of situations.

Because forum doctrine is at bottom a summary of this Court's conclusions regarding the degree of First Amendment protection accorded in certain paradigm

It is difficult to see how a selective exclusion of certain kinds of communicative encounters between students and nonstudents in the domintory rooms of consenting students would satisfy this standard (on the understanding, of course, that otherwise applicable dormitory regulations are complied with *see* n.3, p. 5, *supra*.) Lawyers for example, may charge for their services or provide them for free. *Compare Ohralik, supra*, with *In re Primus*, 436 U.S. 412 (1978). The nature of the advice provided does not necessarily vary according to whether the client pays or does not, nor is the impact upon dormitory life of permitting students to be advised of their legal rights in their own rooms likely to differ depending upon the financial arrangements between lawyer and client. Thus, it is unlikely that there is any governmental interest whatever, much less a compelling one, in precluding students from engaging in otherwise protected communicative activity with nonstudents in the students' own dormitory rooms on the basis of the financial arrangement between the student and the nonstudent.

situations, the Court has cautioned that "in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of citizens at large", the forum analysis is unlikely to be helpful in finding the right answer. *City Council v. Taxpayers for Vincent*, 466 U.S. at 815 n.32.

In particular, as this Court noted in *Airport Commissioners of Los Angeles v. Jews for Jesus*, *supra*, 107 S. Ct. at 2571, "at least one commentator contends that [the forum doctrine] does not control a case . . . in which the [speakers] already have access to the [forum], and therefore concludes that such cases are analogous to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." [10] Although this Court did not in *Jews for Jesus* resolve the question whether forum analysis applies to cases in which the would-be speaker is already permitted on the premises for general purposes, both the cases in which the tripartite forum doctrine was first articulated and a particularly pertinent decision last Term suggest that a single rule that is entirely distinct from the forum typology governs all instances in which

[10] That commentator stated:

> When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech. The various versions of the public forum doctrine address these questions. But public forum analysis is irrelevant when access is not the issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. [See *Jamison v. Texas*, 318 U.S. 413, 416 (1943)]. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech. [Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*. 81 N.W. L. Rev. 1, 48 (1986).]

individuals are simply seeking the right to be free of censorship of their speech activity while validity present on government-owned property.

In each instance in which this Court has concluded that a government-owned or controlled location is a "nonpublic" forum in which government regulation of speech based on content or on the identity of the speaker is permitted, *physical access to a specialized governmental mode of communication was being sought. See Perry Education Assn., supra*; *Cornelius, supra*; *United States Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114 (1981); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).[11]

Moreover, several of those cases expressly noted the fact that the central issue in the case concerned the "access policy" applicable to a government location or program dedicated to promoting communication (*Perry Education Assn.*, 460 U.S. at 49), and not simply the right to communicate as well as to engage other compatible activities in a government location where both the speaker and listeners are validly present. *See also Cornelius, supra*, 473 U.S. at 801-02 (emphasis supplied) (several times characterizing the problem presented by the nonpublic forum cases as one of "access"; *e.g.*, "[h]ere, as in *Perry Education Assn.*, respondents seek *access to a particular means of communication.*") *Compare Republic Aviation v. Labor Board*, 324 U.S. 793

[11] We do not understand *Greer v. Spock*, 424 U.S. 828 (1976) to come within the nonpublic forum class of cases. Rather, as this Court made clear in its treatment of *Greer* in *Brown v. Glines*, 444 U.S. 348, 354 (1980), the First Amendment analysis in *Greer* turned not on the nature of the property in question but on a more general First Amendment balancing approach. *See Brown v. Glines*, 444 U.S. at 355 (the regulations in *Greer* "protect substantial government interest unrelated to the suppression of free expression"—*viz.*, protection of military discipline—and "restrict speech no more than is reasonably necessary to protect the substantial governmental interest.")

(1945) and *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); and *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (the distinction between an employer's interest in restricting physical access to its property by stangers to the enterprise and the interest in limiting the communicative activity of those otherwise validly present is "one of substance.")

Significantly, in *Hazelwood School District v. Kuhlmeier*, — U.S. —, 108 S. Ct. 562 (1988), this Court indicated that there is a crucial difference between limiting access to a government-sponsored mode of communication and limiting free speech activity by individuals *validly present* at a government-owned location. There the Court began by determining that schools generally are not traditional public fora, and that there was no intent on the part of school officials to permit indiscriminate use of the school newspaper by students. 108 S. Ct. at 567-69. The Court therefore held with respect to the school newspaper that "school officials were entitled to regulate the contents of Spectrum in any reasonable manner." *Id.* at 569. At the same time, the Court maintained that

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonable perceive to bear the imprimatur of the school. . . . Accordingly, we conclude that the standard articulated in *Tinker* . . . determin[es] when a school may punish student expression [but is not] the standard for determining when a school

> may refuse to lend its name and resources to the dissemination of student expression. [108 S. Ct. at 569.]

Hazelwood School District, then, recognized that even if a government-owned or controlled location or activity is *not* a traditional public forum, there are still instances in which denials of the right to communicate must be treated, for First Amendment purposes, as analogous to across-the-board censorship and subject to careful scrutiny rather than simply to a reasonableness review. Those circumstances, as the reference to *Tinker*, *supra*, indicates, involve situations in which the individuals seeking to speak are otherwise lawfully present on the property in question, and in which those individuals are not seeking any governmental action fostering speech, but are simply asking that their communicative activity be judged by the same standards of conduct applicable to those lawfully present on the premises who are not seeking to engage in communicative activity.

3. *Tinker*, *supra*, in other words, stands generally for the proposition that the First Amendment requires *government to permit individuals lawfully using a government-owned location to engage in free expression generally compatible with the ordinary use of that location.* Beyond that critical general proposition, *Tinker* is of particular pertinence to this case for another reason: *Tinker* applies that proposition to a situation in which the asserted governmental interest in limiting free expression—feared interference with educational process—is analogous to that relied upon by SUNY in this case.[12]

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[12] Indeed, the governmental interest in preserving order as a means of fostering an appropriate atmosphere for learning was, if anything, stronger in *Tinker* than in this case, both because a high school rather than a university was involved (*cf., e.g., Hazelwood School District v. Kuhlmeier*, 108 S. Ct. at 571 n.71), and because the location there was the classroom building itself and not, as here, a location that serves educational purposes indirectly (by providing a place for students to live and study) rather than directly.

The *Tinker* Court pointed the way to accommodating that interest while preserving the primacy of the First Amendment:

> The principle use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operations of the school" and without colliding with the rights of others. . . . But conduct by the student, in class or out of it, which for any reason—whether it stems from the time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. [393 U.S. at 512-13 (footnotes omitted)].

Analogous principles apply here. In this instance, as noted (n.3, p. 5, *supra*), the University allows students to invite nonstudents to their dormitory rooms for a wide variety of social and educational purposes. Insofar as the activities of these visitors could endanger the educational functions of the university (by creating safety problems, or overcrowding, or undue noise, or distraction from studying, or interference with the privacy of residents), the University is free of course to prohibit or to regulate the visitors' access to the dormitories regardless of whether their purpose in seeking access is to take part in a political meeting or provide solicited legal advice in a First Amendment case or simply to socialize with friends. Insofar as SUNY has not chosen to limit access on any such neutral basis without regard to the

communicative purpose of a visitor's presence in the dormitories, the University may not, without violating the First Amendment, single out fully protected speech for *special, more stringent regulation* than nonspeech activity, or for prohibition, at least absent some compelling need nowhere here suggested. To do so would interfere with the First Amendment rights of both the students wishing to meet with the visitor (*cf. Kleindinst v. Mandel*, 408 U.S. 753 (1972)), and the visitor.

Based on this analysis, the regulation here at issue is invalid to the degree that the regulation reaches speech fully protected by the First Amendment.

III. Governmental Authority to Exclude Commercial Speech from Public Locations Is Considerably Broader Than Its Authority to Exclude Fully Protected Speech and Permits the Application of the Commercial Enterprises Regulation to Sales Presentations Such as That Made by AFS.

In this final section of this brief, we entertain the opposite supposition from that upon which the preceding section was based: We assume that this Court either itself construes the regulation as limited to commercial speech or determines that the overbreadth of the statute is not substantial. On that supposition, the validity of the commercial enterprises regulation, and the outcome of this case, turns entirely upon the question of whether a governmental entity has broader authority to exclude commercial speech from government-owned property dedicated to noncommercial purposes than to ban fully protected speech when engaged in by individuals who are otherwise properly present at that location.

Somewhat surprisingly, it does not appear that any of the spate of commercial speech cases this Court has decided in the twelve years since *Va. Pharmacy Bd., supra*, held that commercial speech is not "wholly outside the protection of the First Amendment" (425 U.S. at 769)

have addressed the problem of whether government may exclude commercial speech from government-owned property dedicated to non-commercial purposes.

Rather, the commercial speech cases for the most part have dealt with the question of whether particular kinds of commercial messages—*viz.*, messages simply proposing a business transaction—may be banned entirely, or closely regulated through disclosure requirements and the like. *E.g., Va. Pharmacy Bd. supra*; *Bates v. State Bar of Arizona, supra*; *Friedman v. Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas & Electric Corp., supra*; *In re R.M.J.*, 455 U.S. 191 (1982); *Posadas de Puerto Rico Associations, supra*; *Shapero v. Kentucky Bar Assn.*, —— U.S. ——, 108 S. Ct. 1016 (1988).

In particular, the intermediate standard of review for commercial speech developed in *Central Hudson* and applied by the court of appeals here pertains in *Central Hudson* itself and in substantially all of the cases to which that standard has been applied (*but cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506-08 (plurality opinion)) to the question of whether the government can silence entirely a particular commercial message, and not to whether a particular locale could be closed to that speech.

Ironically, the one case in this Court that *did* directly address the intersection of commercial speech and governmental control of public property is *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Although *Valentine* is often read as having held that commercial speech is entirely outside the protection of the First Amendment (*cf. Va. Pharmacy Bd*, 425 U.S. at 756, 758), on any close rereading that opinion never so held. Instead, the *Valentine* Court's focus was upon the question of whether a commercial advertiser is permitted to use the public streets to pursue its business objective:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of

communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a business, *but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.* [316 U.S. at 921 (emphasis supplied)].

For three reasons, we submit that the actual holding of *Valentine* retains vitality at least to the extent that the government has *broader* (if not, as *Valentine* held, absolute) authority to regulate commercial speech in government-owned areas devoted to a particular public use than to regulate fully protected expression.

First, as a general matter, this Court has declined to apply within the commercial speech context a number of First Amendment doctrines that pertain to expression accorded full First Amendment protection. One such instance, as we have already seen (pp. 10-12, *supra*), is the overbreadth doctrine. Another is the usual First Amendment rule safeguarding untruthful speech, not because untruths are worthy but because of the likely chill upon truthful speech such a prohibition would work. *Bates v. State Bar of Arizona, supra*, 433 U.S. at 383-384 ("any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated.") These two

examples are manifestations of this Court's overall caution that

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a *limited* measure of protection, commensurate with its subordinate position in the scale of First Amendment calues, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [*Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 456 (emphasis supplied)].

To accord commercial speakers the same right to communicate in public locations as is accorded, e.g., political speakers would invite precisely such a "levelling process", to the ultimate detriment of noncommercial speech: The result of such a uniform rule would be to place peddlers and political speakers on the same plane with respect to the right to speak in public places, with the likely result either that the political speakers will be drowned out by the cacophony of commercial entrepreneurs or that the sheer number of speakers, commercial and political, seeking to express themselves will justify either a complete exclusion of expressive activity or a rationing of those opportunities that can reasonably be accommodated.[13]

Secondly, and related, a large part of the reason for precluding government from shutting off communication among citizens in public places in which they are otherwise lawfully present is to assure that individuals who do not have access to costly modes of communication are not excluded from the public debate:

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. [Stone, *Fora Americana: Speech in Public Places*, 1974 S. Ct. Rev. 233, 245].

See also Schneider v. State, 308 U.S. 147, 161, 164 (1939); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) ("[d]oor to door distribution of circulars in essential to the poorly financed causes of little people").

This consideration has no force whatever with respect to comercial speech. Rather, advertising and other forms of promotional communication, such as that involved in this case, are, for commercial speakers, part of the cost of doing business, recoversable from customers if the business is successful. To claim the right to use public locations without cost in order to promote one's product rather than to pay for an appropriate means of communication is simply to demand a public subsidy of one's business. That is precisely what AFS is demanding in this case: Rather than renting a hotel room and providing sufficient inducements to SUNY students to attend promotional meetings in those rooms, AFS is seeking to avoid the higher costs involved in proceeding in that fashion by using the student's rooms in government-owned dormitories instead. While there are weighty reasons for according the small economic savings to political speech provided by the current understanding of the First Amendment, commercial speech in our society needs no such savings to remain healthy and robust.

Finally, as noted, commercial speech by definition proposes a business transaction. The facts of this case illustrate this well: The AFS demonstrations begin with a

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[13] To illustrate: It seems to us absurd to suggest that a commercial entity could claim after *Va. Pharmacy Bd.* a First Amendment right to use the streets to put on a public presentation to introduce a new product. If such a claim were permitted, then a political group seeking to demonstrate on the same day in the same location might have to forego its plans because the street in question can accommodate only one group at a time.

presentation, but end with the signing of business agreements. As a general matter, our society segregates physically the areas in which people pursue their private lives, and those in which they conduct business. For example, most localities zone commercial uses out of residential areas, in the belief that the two uses are generally incompatible.

We do not believe that such zoning ordinances are invalidated by the First Amendment because communicative activity occurs as part of the commercial uses. Rather, the breadth of governmental authority to regulate commercial activities must include the authority to regulate the physical locations at which such activities take place, despite the incidental impact of such regulation upon commercial speech. Put another way, the rule of *United States v. O'Brien*, 391 U.S. 367 (1968), closely confining the government's authority to affect expressive activity as an incident to regulating conduct, is another of the First Amendment doctrines that appears to have little application to the realm of commercial speech.

While these three considerations caution against a wholesale transfer of the rules governing fully protected speech in public locations to the commercial speech context, we recognize that the points made thus far do not precisely define the principles that are applicable in determining whether there is a right to engage in commercial speech at a particular location. For present purposes, however, no such broad delineation of the governing law is necessary. Rather, the last consideration alone is sufficient to validate the commercial enterprises regulation as applied to commercial speech: The speech here at issue is part and parcel of a commercial transaction that the University clearly has authority to "zone" away from the living places of its students. Given the subordinate place of commercial speech in the hierarchy of the First Amendment, the incidential impact upon speech that result from the exclusion of buying and selling transactions, and their incidents, from the University is within SUNY's prerogatives.

CONCLUSION

For the reasons stated above, this Court should decline the invitation to decide the constitutional issues presented by the parties until the question of the reach of the regulation at issue is clarified. Alternatively, the Court should hold the regulation invalid insofar as it reaches speech fully protected by the First Amendment but valid insofar as it reaches commercial speech.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street, 3rd Floor
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

AMICUS CURIAE

BRIEF

No. 87-2013

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

v.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAINO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CONNECTICUT, UNIVERSITY OF FLORIDA, BOARD OR REGENTS UNIVERSITY SYSTEM OF GEORGIA, UNIVERSITY OF IOWA, MIAMI UNIVERSITY, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, UNIVERSITY OF MISSOURI, UNIVERSITY OF NEW HAMPSHIRE, THE UNIVERSITY OF NEW MEXICO, UNIVERSITY OF NORTH CAROLINA, NORTHERN ILLINOIS UNIVERSITY, OHIO UNIVERSITY, THE OHIO STATE UNIVERSITY, PURDUE UNIVERSITY, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, UNIVERSITY OF SOUTH CAROLINA AND THE UNIVERSITY OF VERMONT IN SUPPORT OF PETITIONERS

RODERICK K. DAANE *
CHARLES A. DUERR, JR.
MILLER, CANFIELD, PADDOCK AND STONE
101 North Main Street, 7th Floor
Ann Arbor, Michigan 48104-1400
(313) 663-2445
Attorneys for Amici Curiae

* Counsel of Record

(Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ANTHONY J. CELEBREZZE, JR.
Ohio Attorney General
On behalf of:
Miami University
Ohio University
The Ohio State University

LACY H. THORNBURG
Attorney General of the
State of North Carolina
On behalf of the
University of North Carolina

QUESTION PRESENTED

Does the First Amendment permit a state university to bar face-to-face commercial sales presentations and commercial transactions in state-owned students' dormitory rooms?

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Constitutional Provisions

U.S. Constitution, Amend. I .... *passim*

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This Brief is filed on behalf of the Board of Trustees of the University of Alabama, University of California, University of Connecticut, University of Florida, Board of Regents University System of Georgia, University of

Iowa, Miami University, University of Michigan, Michigan State University, University of Missouri, University of New Hampshire, The University of New Mexico, University of North Carolina, Northern Illinois University, Ohio University, The Ohio State University, Purdue University, Rutgers, The State University of New Jersey, University of South Carolina, and the University of Vermont. Consent to file this Brief has been obtained from counsel for the parties and has been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

Amici Curiae [1] are state colleges and universities which own and operate student dormitories. Collectively, they

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[1] Name *	Enrollment	Residence Hall Occupancy	Number of Residence Halls
Alabama	18,125	4,158	16
California	153,824	35,886	358
Connecticut	14,722	9,775	91
Florida	34,021	7,262	77
U System of Georgia	161,783	28,080	154
Iowa	29,320	6,500	9
Miami	16,044	7,339	36
Michigan	35,495	9,550	18
Michigan State	42,695	17,928	26
Missouri	54,852	7,367	26
New Hampshire	9,900	4,800	31
New Mexico	28,031	1,984	7
North Carolina	137,000	45,221	189
Northern Illinois	24,255	7,597	10
Ohio	24,767	6,000	40
Ohio State	59,547	10,980	71
Purdue	34,669	12,291	14
Rutgers	47,000	15,000	136
South Carolina	25,084	7,000	30
Vermont	11,160	4,000	29

* Data supplied are approximate and in some instances include enrollment only on campuses having residence halls. Occupancy may include student single and family apartments in some instances.

are responsible for 1,368 residence halls occupied by approximately 248,718 students. As owners and operators of student dormitories, they are responsible for or have an interest in prevention of crime, protection against consumer exploitation, residential tranquility, and promotion of education. In discharging these responsibilities, amici have an interest in limiting or barring commercial activities in students' dormitory rooms by means of rules similar to the State University of New York (SUNY) regulations at issue in this case.[2]

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[2] SUNY's regulation states:

> No authorization will be given to private commercial enterprises to operate on State University campuses or facilities furnished by the University other than to provide for food, campus bookstore, laundry, dry cleaning, barber and beauty services, and cultural events.

On June 3, 1983 the U.S. District Court for the Northern District of New York granted a preliminary injunction to the Plaintiffs, American Futures Systems, Inc. (AFS), et al. against enforcement of this regulation as applied to AFS's group sales demonstrations but noted that the First Amendment did not protect consummation of sales in residence halls. *American Future Systems, Inc.* v. *State University of New York*, 565 F.Supp. 754 (NDNY 1983).

In response SUNY adopted interim regulations. The interim regulations permitted students to invite representatives of AFS to their rooms to present group sales demonstrations to a limited number of guests during specified times and dates. Commercial presentations in common areas were barred. All roommates in the rooms where presentations were to be held were required to consent. A registration form was required of the AFS representative. Consummation of sales was prohibited under the interim regulations. On December 12, 1986 the District Court held that the original SUNY ban on commercial activity was not unconstitutional. The preliminary injunction was lifted and the complaint dismissed. The Court did not rule on the challenge to the interim regulations since they no longer presented a case or controversy once the original regulation was upheld. *Fox* v. *State University of New York*, 649 F. Supp. 1393 (NDNY 1986). In *Fox* v. *State University of New York*, 841 F.2d 1207 (2nd Cir. 1988) the Court of Appeals ruled only on the original ban and held that the District Court on remand

The regulations governing commercial activities at the amici institutions are not identical. Indeed the detailed regulations governing separate campuses, colleges, housing units or types of housing units may vary at a single institution. Regulations range from a complete ban on commercial activities, to a prohibition of certain types of commercial activity such as at SUNY, to allowance of sales only by student groups or for specific products or services (e.g. class rings, yearbook photographers), to allowance of group sales demonstrations by invitation to student rooms with consummation of sales prohibited or limited to individual appointments at a later date or time, or to registration and advance reservation of commons areas with consent of student tenant representatives or university officials.[3]

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should determine whether the regulation directly advanaed substantial state interests and whether the regulation was the least restrictive means to accomplish the state's interests.

On October 3, 1988 this Court granted the petition for writ of certiorari. On the same day the District Court entered its "Memorandum—Decision and Order" in which it assumed without deciding that the original ban directly advanced the state's interests but was nonetheless unconstitutional because it did not employ the least restrictive means for doing so. The District Court also held that the interim regulations directly related to significant interests but that SUNY had failed to demonstrate that its interests could not be protected adequately by a more limited regulation. It held that while a visitor checkpoint in every dormitory would be more expensive, under the Second Circuit mandate, cost was irrelevant to a determination of the least restrictive means.

On October 20, 1988 the District Court stayed the effect of its October 3, 1988 decision pending a hearing and determination on SUNY's application for a stay pending the decision of the Supreme Court.

[3] Respondent's Supplemental Brief in response to the university amici's brief supporting the Petition for Writ of Certiorari asserted that amici's statement that "the amici limit or bar commercial activities in students' dormitory rooms by means of rules similar to the State University of New York (SUNY) regulations at issue in this case" was "irresponsibly false" and stated that the "University of Michigan, has no such policy as represented . . ." (page 8-9). The University of Michigan's policy permits commercial product demonstrations to groups in commons areas by advance registration and reservation, during specified hours. Sales are not permitted during the event or in the communal locations. The policy also states:

> . . . An individual student may invite a commercial seller to his/her residence hall room in order for the seller to disseminate information concerning its products to a group of other invited students. Sales may not be consummated at this time; students may make appointments with the seller to make their purchases in their own rooms at a later date.

This rule is not only "similar" to SUNY's in that both are time, place and manner restrictions but is also very like the interim SUNY regulations, excepting only that consummation of sales is not entirely barred but may take place in a student's own room at a date later than the group demonstration.

The rules at the amici institutions seek to address interests in security, prevention of exploitation, residential tranquility, promotion of education and to generally preserve the dormitories for their dedicated purposes instead of opening them as commercial marketplaces. The fact that these interests are not weighed identically at all amici institutions nor addressed in exactly the same fashion is not surprising. However, what is important to this case is that the rules at all the amici institutions are called into question by the decision of the Second Circuit even though certain specifics of the rules may vary from institution to institution.

Amici oppose the Court of Appeals' unjustified interference with the good-faith efforts of SUNY to control its premises and accomplish its legitimate goals. To the amici universities this case implicates far more than the sale of cookware by the Pennsylvania pots and pans purveyor, American Future Systems, Inc. (AFS). The fundamental right of state colleges and universities to control the use of their premises is at issue and the reach of the Court of Appeals' decision will seriously erode the authority of amici universities.

SUMMARY OF ARGUMENT

A state university may, consistent with the First Amendment, bar face-to-face commercial sales presentations and commercial transactions in state-owned students' dormintory rooms. The Second Circuit erred in failing to apply a public forum analysis to property owned by a state university. Under the doctrine developed in the public forum cases, government, like a private owner, may restrict the use of property to intended purposes. SUNY may bar commercial speech and activity in property which has not been designated as a forum for public communication. The withdrawal of the vendor, AFS, as a formal party to the litigation does not transform the nature of the forum or the asserted rights. The First Amendment rights of a listener are not greater than those of a speaker.

Even as to public property which has been opened for expressive activity, government may establish content-neutral time, place, and manner regulations if narrowly drawn to effectuate a substantial state interest. The Second Circuit erred by failing to analyze SUNY's regulation under the well-developed tests for time, place, and manner regulations.

Finally the Second Circuit compounded its errors by interpreting the four part test of *Central Hudson* v. *Public Service Comm'r*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) for the constitutionality of restrictions on commercial speech as requiring that the restriction be the "least restrictive means" for advancing significant governmental interests. The Second Circuit thus afforded more protection to commercial speech than is afforded even to political speech. SUNY's regulation is a content-neutral, narrow restriction on commercial speech which advances significant interests. Under the decisions of this Court. SUNY's regulation does not unconstitutionally restrict First Amendment rights with respect to commercial speech.

ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT BY FAILING TO APPLY A PUBLIC FORUM ANALYSIS TO PROPERTY OWNED BY A STATE UNIVERSITY.

American Future Systems, Inc. (AFS) withdrew as a named plaintiff from this case and was not a party to the appeal to the Second Circuit, in which it participated only as amicus curiae. This tactical retreat, leaving only the student plaintiffs (represented by the same attorneys who represented AFS), had the obviously desired effect; the Second Circuit was led astray and applied the wrong test for constitutionality. The Second Circuit wrote:

> Since this case no longer involves the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights, the public forum cases thought applicable by the district court are inapposite. *Fox* v. *State University of New York*, 841 F.2d 1207 at 1212 (2nd Cir. 1988).

But the withdrawal of AFS did not alter the nature of this case nor of the forum which is involved. Whether AFS is a named party or a vitally interested non-party, the case still involves the asserted right of the student plaintiffs to grant a right of access to public, university-owned property to commercial vendors for purposes of product demonstrations and sales. While the students have an undisputed right of access to their rooms, they do not have the unrestricted right to confer access on commercial invitees.

It is well established that the Constitution protects not just the right to speak but also the right to receive information. *Martin* v. *City of Struthers*, 319 U.S. 141,

63 S. Ct. 862, 87 L. Ed. 1313 (1943); *Stanley* v. *Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969); *Board of Education* v. *Pico*, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 453 (1982). However, it would defy common sense to hold that legitimate restraints upon the time, place, or manner of speech can be defeated simply because the speaker can find a willing listener. Such an argument was rejected in *Kliendienst* v. *Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972).

Kleindienst involved a challenge to Congress' plenary power to make policies and rules for the exclusion of aliens. The challenge was brought by the excluded alien (Mandel) and by a group of citizens who had invited Mandel and desired to hear him speak. This Court said:

> Appellee's First Amendment argument would prove too much. In almost every instance of an alien excludable under [law], there are probably those who would wish to meet and speak with him. . . . Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under [law], one of two unsatisfactory results would ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. 408 U.S. at 768.

Similarly, if an otherwise constitutional ban or restriction on commercial activity on government property can be defeated by the expedient of identifying an individual having access to the property who can be induced to invite the vendor, nothing is left of the ban or restriction. By this means a nonpublic forum dedicated

to a restricted use is made a public forum in every case or the courts are left to some undefined balancing test. The fact that the First Amendment's reach encompasses the rights of listeners does not require that a state university become a cookware bazaar.

In *American Future Systems* v. *Pennsylvania State University*, 752 F.2d 854 (3rd Cir. 1984), *cert. den.*, 473 U.S. 911, 105 S. Ct. 3537, 87 L. Ed. 2d 660, the Court held that the regulation at issue did not violate the right of students to receive nor AFS to disseminate commercial information and applied the same standard to these correlate First Amendment rights. "(W)e do not believe . . . that the speech at issue can be commercial for purposes of determining AFS's rights but pure for purposes of determining the students' rights." 752 F.2d at 862.

The public forum analysis has been frequently and consistently applied.[4] It was synthesized in *Perry Edu-*

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[4] Tracing the roots of the doctrine is beyond the scope of this brief, but the consistency and frequency of its application is illustrated by the following incomplete list. *Grayned* v. *City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (picketing on public way near schools); *U.S. Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981) (letter boxes); *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L. Ed. 2d 440 (1981) (campus facilities of state university); *Perry Education Ass'n* v. *Perry Local Education Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (school mail system); *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (posting signs on public property); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (sleeping in symbolic tents in national park); *United States* v. *Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985) (violating bar of respondent's presence on military base during public open house); *Cornelius* v. *NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (exclusion from participation in charity drive in federal offices); *Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S.

cation Ass'n v. *Perry Local Education Ass'n*, 460 U.S. 37, 45-46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). The Court identified three categories of public property. The first is property "which by long tradition or government fiat [has] been devoted to assembly and debate." 460 U.S. at 45. As to "these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 460 U.S. at 45.

The second category is public property which the State has opened for expressive activity. 460 U.S. at 45. Though the State is not required to forever retain the open character of such a facility, as long as it does so the same standards apply as to a traditional public forum. "Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." 460 U.S. at 46.

The third category is "(p)ublic property which is not by tradition or designation a forum for public communication." 460 U.S. at 46. Here the First Amendment does not guarantee access.

> . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. 460 U.S. at 46.

The power of the State is not less than that of a private property owner to restrict the use of property to its in-

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——, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987) (First Amendment activities in airport terminal); *Frisby* v. *Schultz*, 487 U.S. ——, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (picketing on public streets in residential area).

tended purposes. *U.S. Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981).

By ignoring the public forum cases, the Second Circuit gave short shrift to the right of the state university to impose narrowly drawn, content-neutral time, place, and manner restrictions (if a dormitory room is a first or second category public forum) or to reasonably restrict speech or otherwise reserve the use of a dormitory room to its intended purpose (if the room is not a public forum).

The public forum cases have permitted a total ban on a medium of communication even in a public forum and even when the speech was noncommercial. The applicable test was enunciated in *United States* v. *O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 627 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest. 391 U.S. at 337.

The test for the constitutionality of time, place, and manner restrictions was somewhat differently expressed in *Regan* v. *Time, Inc.*, 468 U.S. 641, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984). The Court wrote:

> . . . In order to be constitutional, a time, place, and manner regulation must meet three requirements. First, it "'may not be based on either the content or subject matter of speech'" . . . Second, it must "'serve a significant governmental interest.'" . . . And third, it must "'leave open ample alternative channels for the communication of the information.'" 468 U.S. at 648.

In *Frisby* v. *Schultz*, 487 U.S. ——, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988), this Court quoted with approval from *Perry*, in holding that time, place, and manner regulations are enforceable if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." 487 U.S. at ——, 101 L.Ed. 2d at 429.

Even if dormitory rooms are first or second category public fora in which commercial speech cannot be totally banned, SUNY is entitled to impose time, place, and manner restrictions. Regardless of whether the test for such regulations is expressed as "no greater than essential," *O'Brien*, or "narrowly tailored", *Regan* and *Frisby*, it is clear that the standard is not the "least restrictive means" test employed by the Second Circuit below. Indeed a "least restrictive means" test has been expressly and frequently rejected as the standard for judging content-neutral time, place, and manner regulations applicable to a speech in a public forum.

By brushing aside the public forum cases as well as allowable time, place, and manner regulations in favor of a "least restrictive means" test, the Second Circuit has terminally impaired the authority of state universities to regulate commercial activities in dormitories. The near impossibility of establishing time, place, and manner regulations under the decision of the Second Circuit is illustrated by the District Court's decision on remand in which it held that reasonable restrictions do not withstand scrutiny unless they are the least restrictive alternative and that under such a test, cost is immaterial.

The SUNY regulation which bans face to face commercial sales presentations on campus is a reasonable time, place, and manner regulation. It applies without regard to the content of speech, exempting only certain products or services. Just as in *Perry Ed. Assn.* v. *Local Ed.*

Assn., *supra*, the distinction drawn by the regulation is based on status, not views. It serves significant governmental interests (prevention of crime protection against consumer exploitation, residential tranquility, promotion of education). It is narrowly tailored and reaches only those activities which impinge upon legitimate interests. It leaves open alternative avenues of communication off campus (see *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 460, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981)) and does not affect advertising in print, other mass media or telephone solicitations.

Time, place, and manner regulations, even when aimed at "pure" speech and affecting interests at least as important as those involved here and even when less narrowly tailored than SUNY's regulation, have survived First Amendment scrutiny. The tests for survival are less rigorous when only commercial speech is at issue because such speech occupies a "subordinate position in the scale of First Amendment values" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)).

In *Ohralik* the Court examined a rule barring in-person solicitations by attorneys. The rule was a complete ban, irrespective of time or place. It was designed to protect the public from solicitation involving fraud, undue influence, intimidation, overreaching and vexatious conduct, but was not narrowly drawn to permit in-person solicitation which was free of such vices. Nonetheless, the Court upheld the rule, noting that the "State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." 436 U.S. at 456.

In *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) the Court upheld a complete ban on posters on public property in the interests of eliminating visual clutter. The Court

employed the *O'Brien* test that the restriction be "no greater than essential", 466 U.S. at 805, and held that the ban on posters could be justified if the regulation was "narrowly tailored". 466 U.S. at 808. The Court found that less restrictive alternatives such as limiting the types of public property to which the ban applied, exempting certain types of messages from the ban, allowing posters only during political campaigns, or imposing only size or color restrictions would be less efficacious. 466 U.S. at 815-816. The Court upheld the ordinance, finding that it "curtails no more speech than is necessary to accomplish its purpose." 466 U.S. at 790.

In *Clarke* v. *Community for Creative Nonviolence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) the Court upheld a ban on sleeping on public land, which under the circumstances of the case was expressive conduct, because the regulation was narrowly drawn and there were ample alternative channels for communication. The Court rejected the argument that a less restrictive ban on cooking, digging or other aspects of camping could advance the government's interest without jeopardizing the symbolic action of sleeping to demonstrate the plight of the homeless.

In *Chapman* v. *Thomas*, 743 F.2d 1056 (4th Cir. 1984), *cert. den.*, 471 U.S. 1004, 105 S. Ct. 1866, 85 L. Ed. 2d 160)1985), the Court upheld a North Carolina State University regulation prohibiting door-to-door solicitations in dormitories except by candidates for the three highest student government offices. It held that a dormitory was not a public forum and the rule with its narrow exception was to be evaluated under a reasonableness standard. 743 F.2d at 1059.

Moreover, in *United States* v. *Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985), this Court upheld the exclusion of an individual from a military base, even during an open house for the public. The

Court rejected less restrictive alternatives for advancing the governmental interests:

> . . . Nor are such regulations invalid because there is some imaginable alternative that might be less burdensome on speech. . . . Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. 472 U.S. at 689.

Finally, in *Frisby* v. *Schultz*, *supra*, a case involving an antipicketing ordinance operating "at the core of the First Amendment" on public streets which are "the archetype of a traditional public forum," 487 U.S. at —, 101 L. Ed. 2d at 428, the Court held that a ban on picketing in front of residences was a constitutional time, place, and manner restriction. Ample alternative channels of communication remained open and a complete ban was "narrowly tailored" since it was aimed at the evil it sought to remedy, disruption of residential tranquility. Though *Frisby* emphasized that the speech was "directed primarily at those who are presumptively unwilling to receive it", 487 U.S. ——, 101 L. Ed. 2d 434, it remains instructive even though the speech in the present case is directed at invited guests presumably willing to listen. As the District Court below indicated,

> The plaintiffs place considerable emphasis on the fact that the AFS demonstrations result from "invitations" made by the students . . . The distinction may have some merit under different facts. Here, however, the court concludes that the "invitations" in question resulted from unsolicited mailings and telephone calls promising vacations and other gifts. Using "common sense," the plaintiffs should not be permitted to distinguish this case on the basis of such induced invitations. 649 F. Supp at 1398, footnote 7.

Furthermore, in *American Future Systems, Inc.* v. *Pennsylvania State University*, 752 F.2d 854 (3rd Cir. 1984), *cert. den.*, 473 U.S. 911, 165 S. Ct. 3537, 87 L. Ed. 2d 660, it was noted that AFS seeks to have about ten to fifteen female students at each demonstration and, "If fewer than the optimal number of students are present five minutes before the demonstration is scheduled to begin, the AFS representative asks those in attendance to attempt to round up others." 752 F.2d at 857. These circumstances clearly implicate the University's interest in residential tranquility.

Under the facts of this case, SUNY has not opened its dormitories as a public forum and retains the authority to restrict their use to dedicated residential and educational purposes. In a nonpublic forum there is no requirement that the restriction be "narrowly tailored." It need only be reasonable, *Perry, supra; Chapman, supra.* It need not even be the "most" reasonable or "only" reasonable limitation. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

Alternatively, even if SUNY's dormitory rooms are held to have been opened for expressive activity, SUNY retains the right to impose time, place, and manner restrictions. Contrary to the decision below, which erroneously applied a "least restrictive means" test under an inapposite commercial speech analysis, this Court has repeatedly applied a public forum analysis of time, place and manner regulations of expressive activity on governmental property, requiring only that the regulations be "narrowly tailored." And even in cases involving political speech in traditional public fora this Court has refrained from imposing a "least restrictive means" standard on time, place, and manner regulations. There is no valid basis for the Second Circuit's application of such a test to a regulation reaching only commercial speech on SUNY's dormitory property.

II. THE SECOND CIRCUIT ERRED IN ITS APPLICATION OF THE FOURTH CRITERION OF *CENTRAL HUDSON*.

Having erroneously failed to recognize this case as a public-forum case, the Second Circuit compounded its error by applying a "least restrictive means" standard to commercial speech in SUNY dormitory rooms and thus afforded more protection to commercial speech than the First Amendment requires. Indeed, the Court of Appeals has created a startling anomaly: Commercial speech in the Second Circuit will now be entitled to greater protection than this Court has extended to political speech. Cf. *Boos* v. *Barry*, 485 U.S. ——, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *City Council* v. *Taxpayers for Vincent, supra; Cornelius* v. *NAACP Legal Defense & Ed. Fund, supra.*

Until *Virginia Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), speech relating to purely commercial transactions was not understood to be protected at all by the First Amendment. When protection came it was limited, as explained in *Ohralik* v. *Ohio State Bar Ass'n, supra*:

> We have not discarded the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to governmental regulation, and other varieties of speech . . . To require a parity of constitutional protection for commercial and noncommercial speech alike would invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection commensurate with its subordinate position in the scale of First

> Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. 436 U.S. at 455-456.

In *Central Hudson Gas* v. *Public Service Comm'n*, *supra*, this Court set out a four-part analysis for a valid restriction on commercial speech.

> . . . . At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. 447 U.S. at 466.

The Second Circuit erroneously interpreted the fourth part of the analysis ("not more extensive than necessary") as a literal "least restrictive means" standard. But *Central Hudson* did not apply a "least restrictive means" standard and to do so would "devitalize" the First Amendment in precisely the way cautioned against in *Ohralik*, *supra*.

The Third Circuit in *American Future Systems* v. *Pennsylvania State University*, *supra*, declined to read *Central Hudson* as requiring a "least restrictive means" test. The Third Circuit wrote:

> In light of recent Supreme Court precedent, we believe that this last prong of the *Central Hudson* test cannot be read as a "least restrictive means" requirement. . . .
>
> Although the Supreme Court has not yet addressed this issue in the context of the *Central Hudson* test, we see no reason for doubting that it would interpret the "no more extensive than necessary" language of *Central Hudson* in the same way it

> has interpreted the "narrowly tailored to serve a significant governmental interest" language in *Community for Creative Non-Violence*. Therefore, although we might be able to imagine alternative regulations that accomplish Penn State's objectives while interfering less with the students' and AFS's rights to communicate, we will not strike down the university's regulation on this ground. This Court may not establish itself as the manager of Penn State's students and property, nor may it substitute its own judgment for Penn State's conclusion as to the best means to carry out the university's legitimate ends. There is a whole realm of permissible means of accomplishing the university's objectives, and our function must be limited to determining whether the school has chosen an acceptable—not the least restrictive—alternative. 752 F.2d at 865-866.

The statement of the Third Circuit that the Supreme Court has not addressed the issue of what is meant by the fourth prong of the *Central Hudson* test is, of course, no longer true. Its prediction that this Court would not adopt a strict "least restrictive means" standard and afford a measure of governmental discretion as to the means selected has proved prescient in light of *Posadas de Puerto Rico Assoc.* v. *Tourism Co.*, 478 U.S. 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986).

In *Posadas* this Court examined the third and fourth prongs of *Central Hudson* in terms of the fit between means and ends. *Posadas* held that restrictions on commercial speech which applied only to advertising aimed at residents but not at tourists were narrow restrictions satisfying the fourth step of the *Central Hudson* analysis. *Posadas* further held that it was up to the legislature of Puerto Rico to decide whether other less restrictive means would be as effective in serving the legitimate interests of Puerto Rico.

The Second Circuit's interpretation of the fourth prong of *Central Hudson* as a "least restrictive means" stand-

ard is clear error. It leads to immoderate conclusions such as the District Court's on remand from the Second Circuit that "cost is immaterial" and that SUNY could insure security and tranquility by the less restrictive means of establishing a visitor checkpoint in every dormitory. It is just such choices between means that *Posadas* left to the legislature. It is just such choices that this Court has traditionally left to educational decision-makers. See, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 278, 279, 102 S. Ct. 269, 70 L.Ed.2d 440 (1981), *Hazelwood School District* v. *Kuhlmeier*, —— U.S. ——, 108 S. Ct. 562, 271, 98 L. Ed. 2d 592 (1988).

A ban on face-to-face group demonstrations or commercial sales in dormitory rooms leaves open alternative avenues of communication and is not an unconstitutional restriction on expressive activity. It is a narrow restriction which advances the legitimate governmental interests in prevention of crime, protection against consumer exploitation, preservation of residential tranquility, and promotion of education. A narrowly tailored restriction need not be the least restrictive imaginable, especially when less restrictive means may compromise the interests otherwise advanced. In the end, as Justice Blackmun observed in *Illinois Election Board* v. *Socialist Workers Party*, 440 U.S. 173, 188-189, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) (concurring) there is probably no restriction which could reliably be termed "least restrictive"; some judge or lawyer will always be able to find a slightly less restrictive way to argue for invalidation and thus bend the First Amendment out of shape. To be constitutional a restriction on commercial activity need not be hopelessly impractical.

CONCLUSION

Amici Curiae respectfully urge that the decision below should be reversed.

Respectfully submitted,

RODERICK K. DAANE *
CHARLES A. DUERR, JR.
MILLER, CANFIELD, PADDOCK AND STONE
101 North Main Street, 7th Floor
Ann Arbor, Michigan 48104-1400
(313) 663-2445
Attorneys for Amici Curiae

ANTHONY J. CELEBREZZE, JR.
Ohio Attorney General
On behalf of:
Miami University
Ohio University
The Ohio State University

LACY H. THORNBURG
Attorney General of the
State of North Carolina
On behalf of the
University of North Carolina

* Counsel of Record

AMICUS CURIAE

BRIEF

No. 87-2013

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

v.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS IN SUPPORT OF PETITIONERS

Of Counsel:

SHELDON E. STEINBACH
General Counsel
AMERICAN COUNCIL ON EDUCATION
Suite 800
One Dupont Circle, N.W.
Washington, D.C. 20036

RICHARD D. MARKS *
MICHAEL B. GOLDSTEIN
JANE B. BULBIN

DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500
Counsel for Amici Curiae

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2013

THE BOARD OF TRUSTEES OF THE
STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

v.

TODD FOX, EDWARD R. DETWEILER,
STEPHANIE VAIANO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The federal question presented in this case, the appropriate constitutional analysis of attempts to use college dormitories for commercial purposes, is a matter of surpassing and continuing importance to the *thousands* of colleges and universities across the United States which

the *amici curiae* represent. The *amici* appear in this case because the Court of Appeals misapplied the law in reaching its decision below. If allowed to stand, the decision will impair the ability of public institutions of higher education throughout the United States to manage their student housing facilities properly, and to carry out obligations to protect the physical well-being of their students and enhance their intellectual development.

Collectively, the member institutions of the *amici curiae*, the American Council on Education ("ACE"), the American Association of State Colleges and Universities ("AASCU"), the National Association of State Universities and Land Grant Colleges ("NASULGC"), and the National Association of Student Personnel Administrators ("NASPA"), are responsible for ensuring the safe, efficient and educationally productive management of hundreds of thousands of student housing units.

ACE was founded in 1918 and serves as the national association of all sectors of American higher education. Its membership consists of approximately 1,500 institutions, and includes a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of American higher education, including supporting the interests of all component groups of the academic community: students, faculty, administration, the public sector, and the nation of which all are a part. In matters of public policy, ACE commonly serves as the "umbrella" organization for the interests of higher education.

AASCU was founded in 1961, the outgrowth of a predecessor association of state colleges and teacher training institutions. Its 373 member institutions and 30 state university systems constitute a substantial majority of public senior colleges and universities. AASCU-member institutions enroll approximately 2,600,000 students, of which approximately sixty percent (60%), or 1,560,000, live in college or university-controlled housing.

NASULGC traces its origins to the year 1871. The organization's 128 member institutions are the designated Land Grant universities in each of the states, as well as the "flagship" state universities and other large public universities. NASULGC-member institutions enroll approximately 2.7 million students, of whom approximately sixty percent (60%) live in university dormitories or other university-owned housing.

NASPA, founded in 1919, is the national association of university administrators responsible for student affairs. The primary purpose of NASPA is to assist members in fostering the maximum personal development of students as members of society. To accomplish this purpose, the organization conducts an extensive program of research, training and development, as well as publication in the field of student affairs, including substantial work concerning the proper administration of institutional housing facilities. Over 3,600 individuals and 1,100 colleges and universities are members of the Association.

It is the view of the *amici curiae* that college dormitories are more than places to house students. They are an integral part of the educational environment of the institution. The dormitory is a center for learning and for developing social skills, as well as an abode. For the vast majority of students attending public colleges and universities, the dormitory also is the first residence outside the family home. The institution therefore must administer housing carefully, to assure a residential environment appropriate to the school's mission and the students' needs.

The administration of a dormitory generally is a task substantially more complex than that of managing a commercial residence. College administrators must constantly strike a delicate balance between the rights and interests of each student, and those of his or her neighbors.

The decision below is a serious impediment to the ability of college authorities to execute their educational and security responsibilities properly in the management of dormitories.

SUMMARY OF ARGUMENT

Opinions of this Court distinguish clearly between (1) regulation of conduct and speech incident to that conduct, *e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and (2) direct regulation of commercial speech standing alone, *e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

This case concerns the regulation of commercial conduct on campuses of the State University of New York (SUNY). To further the substantial interests of health, safety and welfare of the students, as well as the primary educational mission of the institution, SUNY bans most commercial activity on the University's campuses. Because the ban is reasonable, seeks to further substantial interests of the University community, and is a narrowly tailored regulation of conduct with an incidental impact on commercial speech, the regulation is valid and should have been upheld. The Court of Appeals therefore erred in holding SUNY's regulation an unconstitutional infringement on the First Amendment rights of certain students who sought to host sales sessions in their rooms.

The Court of Appeals overlooked the fact that SUNY's ban is aimed at *conduct* and only incidentally restricts speech; incorrectly viewed the regulation as an impermissible limitation on commercial speech; and analyzed this case under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than under *O'Brien* and *Clark*. Its decision conflicts with applicable decisions of this Court and should be reversed.

ARGUMENT

I. The Opinion Below Applies The Wrong Legal Test To A Prohibition On Certain Commercial Activities, In Conflict With The Decision Of This Court

This case is about state university students' claims of right to invite vendors into their dormitory rooms to sell china and cookware to them and to other students gathered there. The students and the Court of Appeals view the university's ban on such sales as denying students the right to receive information. 11a-13a.[1] *Amici*, in contrast, support SUNY's view, on the ground that the ban is a reasonable restriction on commercial activity accompanied by an incidental restriction on speech that is wholly justified under *United States v. O'Brien*, 391 U.S. 367 (1968), *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *United States v. Albertini*, 472 U.S. 675 (1985).

With the limited exception of certain specified services necessary for the day-to-day needs of the campus community, SUNY bans commercial enterprises from operating on its campuses. 6a. This ban extends to vendors invited by students to use their dormitory rooms for commercial enterprises. *Id.* SUNY's aim is to preserve the dormitories' educational environment, assure students' safety and prevent their commercial exploitation, and avoid the use of these tax-supported residence halls for commercial purposes. The Court of Appeals concedes that these interests are substantial, 14a-15a; *cf. Frisby v. Schultz*, 108 S.Ct. 2495 (1988). Certain SUNY students challenge this regulation on First Amendment grounds and the Court of Appeals, applying *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), remanded for trial to deter-

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[1] All numerical references followed by "a" or "b" refer to pages of the petitioners' appendix filed with the petition for certiorari.

mine whether a less restrictive means exists to further the state's goals. 15a-16a.

The Second Circuit confused the various ways in which commercial activity and commercial speech interrelate, and the different tests this Court has prescribed for state action that seeks to regulate one or the other. Further, a decision of the Third Circuit, dealing with essentially the same facts but upholding a similar campus ban, also focused primarily on regulation of commercial speech under *Central Hudson*. *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984) (*Central Hudson* test applied and university's restrictions upheld; demonstration of less restrictive means specifically not required under *Central Hudson's* "no more extensive than necessary" criterion).

Amici believe that this Court's developing doctrine in commercial speech cases, combined with the fact that commercial speech necessarily is involved in the sales of china and cookware at issue here, distracted the courts both below and in *American Future Systems*. Commercial speech certainly is present in the dormitory room sales pitches made by American Future Systems (AFS) representatives, but that is only one starting point for First Amendment analysis under decisions of this Court. The initial question is whether SUNY's regulation is aimed at prohibiting commercial transactions and associated sales actvity or whether, instead, it is intended primarily to restrict speech, commercial or otherwise.

No one should doubt that the supposedly protected activity here is the marketing of china and cookware to college students in the commercially very convenient sales setting of dormitory rooms.[2] This case does not, for

[2] Respondents argued in their brief below that "[t]he prohibited communications involve a wide range . . . from legal advice and/or medical advice about birth control, to information concerning nutritional cooking and cookware." Brief of Plaintiffs-Appellants at

example, involve on-campus solicitations by political or evangelical groups, *see Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985) (upholding policy banning campus solicitations in face of challenge by non-student members of Socialist Workers Party); *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984) (upholding, under *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), state university prohibition against door-to-door solicitation in university dormitories in face of challenge by student seeking to encourage attendance at bible discussions). It does not involve activity undertaken as symbolic speech, *see, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966) (protecting silent demonstration in public library).

Rather, this case turns upon the distinction between government regulation of commercial activity (of which speech is a necessary part) and government regulation aimed at commercial speech itself. The commercial activity in this case, selling china in dormitory rooms, is not inescapably intertwined with historical notions of free speech. *Compare Martin v. Struthers*, 319 U.S. 141 (1943) (ordinance forbidding Jehovah's Witness from distributing religious literature door-to-door held unconstitutional), *with Breard v. Alexandria*, 341 U.S. 622 (1951) (ordinance forbidding door-to-door sale of goods held constitutional). Moreover, the speech associated with AFS's attempts at dormitory room sales is unquestionably

12. However, Respondents do not mount a facial challenge to SUNY's regulation. If they did so, their position could not be sustained and the case would be dismissed, because a valid constitutional application of the regulation is easily conceivable and no claim was made that the regulation is so overbroad as significantly to compromise First Amendment rights of non-parties. *See New York State Club Association, Inc. v. City of New York*, 108 S.Ct. 2225, 2232-35 (1988); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-803 (1984). Consequently, the case concerns only SUNY's regulation *as applied* to the sales activities of American Future Systems, described at 3a-4a and 6a-7a of the Court of Appeals' opinion.

commercial speech as a matter of law under *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983); *see also American Future Systems, Inc.*, 752 F.2d at 862. That a sales presentation contains expressive content, so stressed by the students, is unremarkable, and recalls an observation from *Clark*:

> [A]lthough we have assumed for present purposes that the sleeping banned in this case would have an expressive element, it is evident that its major value to this demonstration would be facilitative.

468 U.S. at 296. Similarly, the pitch for cookware is aimed at making sales, not at edifying college students about the intellectual framework for evaluating pans and crockery. JA 234-35.[3] Of course information is presented, but the claim of educational content is pretextual.

Viewed as banning the sale of goods in dormitory rooms, with an incidental effect on commercial speech in that special setting, the SUNY regulation should be analyzed under *O'Brien*, *Clark* and *Albertini*, because its focus is on conduct. For the same reason, *Central Hudson* is not the best test. The Public Service Commission policy statement at issue in *Central Hudson* prohibited electric utilities from advertising to stimulate the purchase of utility services. Its focus was on preventing speech with that particular content, extolling use of electricity. It did not seek to ban sale of electricity in particular places. 447 U.S. at 559-60. The governmental action was aimed directly at suppressing commercial speech because of its content.

SUNY's regulation is not, like the Public Service Commission policy in *Central Hudson*, directed solely at commercial speech. It is directed at prohibiting the sale itself. *O'Brien*, *Clark* and *Albertini* are appropriate because they provide a framework for analyzing governmental proscription of activity that has an incidental effect on

[3] This reference is to the parties' Joint Appendix.

speech. This approach permits regulation of "only the independent noncommunicative impact of conduct within its reach," *O'Brien*, 391 U.S. at 382, based on a substantial governmental interest and an appropriately narrow —not the least restrictive—means of protecting that interest. *Id.* (Although one can conceive a regulation permitting sales presentations but banning any order-taking or the consummation of any sale, resort to such an artifice is hardly compelled by *O'Brien*.)

Because SUNY's regulation is not aimed at excluding people from residence halls unless they engage in certain proscribed sales conduct, the *O'Brien* doctrine is better suited to this case than forum analysis. Place is important, but not controlling. Manner of conduct is the important variable, and the *O'Brien* line of cases (incorporating time, place, or manner concepts) is designed specifically to explore the incidental impact upon speech of a restraint on conduct. This Court's cases make clear that time, place or manner decisions employ essentially the same criteria as *O'Brien*, albeit using somewhat different terminology. *See, e.g., Clark*, 468 U.S. at 294, 298 & n. 8 (regulation forbidding sleeping defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct under *O'Brien*; four-factor *O'Brien* standard "is little, if any, different from the standard applied to time, place, or manner restrictions"); *Taxpayers for Vincent*, 466 U.S. at 804-05, 808-810 (relying on *O'Brien* and time, place, or manner analyses in tandem). Moreover, as we will demonstrate in the next section, *O'Brien* is the most direct path to resolving this case. It facilitates a focus on the essential of what is banned (commercial transactions in dormitory rooms), the reason for the ban, and the relationship of commercial speech to the forbidden conduct.

II. Under *United States v. O'Brien*, SUNY's Regulation Is A Proper Restriction On Conduct With An Incidental Effect On Speech

O'Brien declares:

> [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

SUNY's constitutional power to regulate the campus environment to foster educational goals is not open to serious dispute. In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court explained universities' latitude in use of their facilities:

> [O]ur cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." . . . We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose *reasonable regulations* compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Id. at 267 n. 5 (emphasis added, citation deleted).

The importance and substantiality of SUNY's interest in maintaining the dormitories' security and, to the extent practicable, an appropriate residential environment for study and social development, is also established. *See,*

e.g., Widmar, 454 U.S. at 276-77; *Healy v. James*, 408 U.S. 176, 180, 192-93 (1972). In particular, when the state operates housing, it must act reasonably in maintaining its property in a safe condition in view of all circumstances, including the likelihood of injury to others, potential seriousness of the injury, and burden of avoiding risks. Courts have held that, under such a standard, the state has a duty to maintain sufficient security measures. *Miller v. State*, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984); *Preston v. State of New York*, 59 N.Y.2d 997, 998, 466 N.Y.S.2d 952, 453 N.E.2d 1241 (1983), *quoting Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 (1976). SUNY's ban is one means of accomplishing this result.

The interests that SUNY seeks to promote are also unrelated to the suppression of free expression. Resolution 66-156, as amended, is not adopted for the purpose of prohibiting the dissemination of information about AFS's products or to discourage the purchase of its goods at places off campus, where commercial sales activity is appropriate. The regulation makes no attempt to prevent students from receiving that information in their dormitories by mail or telephone, or from attending AFS demonstrations off-campus. SUNY, in forbidding use of dormitories by anybody for any commercial sales (other than those basic items, such as laundry and beverage service, excepted in the regulation), seeks only to preserve the educational purpose and character of its dormitories and to minimize intrusions on the privacy of residents.

This is analogous to the town of Brookfield's action in *Frisby*, banning picketing on public streets "before or about" any residence for the purpose of preserving the tranquility of the home, 108 S.Ct. at 2498. SUNY's ban similarly preserves the tranquility of dormitory rooms near rooms where AFS solicitation meetings would otherwise take place. Moreover, *Frisby* concerned core po-

litical speech protesting abortion, not commercial sales pitches for cookware. Consequently, the prohibition against picketing upheld in *Frisby*—recognizing *the state's right to adopt measures assuring the peacefulness of residences*—is a far greater and more direct imposition on traditional free speech rights than SUNY's incidental regulation here.

This analysis also wholly undercuts any notion to which the Court of Appeals alluded, 13a, that students' privacy rights in their rooms justify invalidating the ban on private commercial activity in the dormitories. What is at stake in the present case is not the privacy rights of SUNY students who seek to host AFS demonstrations in their rooms. The issue instead is whether the students, for consideration in the form of Florida hotel accommodations, have a right to offer use of their rooms for sales activities. SUNY's responsive regulation is directed, in a manner reminiscent of *O'Brien*, *Clark*, and *Taxpayers for Vincent*, at problems which university administrators knew from their local experience occurred on campuses where commercial solicitation was permitted. The ban on campus commercial activity is designed to reduce the incidence of criminal activity and security problems, and to assure the academic and social environment which the school's residences are designed to foster. SUNY's ban on commercial activity is therefore a rational means of assuring that the campus residences—not just host students' quarters—will retain their unique noncommercial, educational character, and will not be overrun with vendors in derogation of SUNY's institutional mission.

The last element of the *O'Brien* test is whether the incidental restriction on freedom of expression "is no greater than is essential to the furtherance" of the state's regulatory interest. 391 U.S. at 377. Although this test requires narrow tailoring, it does not, as the Second Circuit views *Central Hudson*, demand use of

the least restrictive means. This is well illustrated by *Clark*, which dealt with claims of free speech in what certainly is a public forum—Lafayette Park, across from the White House. The Park Service's reasonable time, place and manner restrictions forbidding camping in the park were not subjected to a less restrictive means test, despite claims of symbolic expression by demonstrators seeking to sleep there to publicize the plight of the homeless. Further, this Court noted that validation of the Park Service ban on camping need not be premised solely on the limited nature of the disruption that might be caused by the sleeping demonstrations planned by the Community for Creative Non-Violence. Rather, the Service could base its policy on the need to deal comprehensively with the problems sleeping demonstrations could cause. 468 U.S. at 296-97.

Similarly, SUNY's interest in maintaining a safe and noncommercial educational residential environment for students need not be judged solely by reference to the conduct of American Future Systems, Inc. Absent the regulation, other commercial vendors undoubtedly would proceed to sell in the dormitories. Because SUNY has a legitimate interest in ensuring that the dormitories do not become inundated with commercial pursuits for personal gain, and because the residences would be more exposed to such harm without the ban on commercial activity on campus than with it, the ban is valid under the First Amendment as a reasonable regulation of the manner in which campus residences may be administered. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 652-55 (1981); *Taxpayers for Vincent*, 466 U.S. at 810.

In *Clark*, preservation of national parks in the Capital "in an attractive and intact condition," 468 U.S. at 296, was a sufficient governmental interest to justify the Park Service's regulation. The Court quoted *Taxpayers for Vincent*, 466 U.S. at 810, for the proposition that the

regulation "responds precisely to the substantive problems which legitimately concern the [Government]." 468 U.S. at 297. To the extent that the regulation is reasonable, and is designed to establish and enforce sufficiently important institutional interests, it passes constitutional muster under *Clark*, even though it may directly limit oral or written expression.

Similar application of the "narrowly tailored" requirement is illustrated in *United States v. Albertini*, 472 U.S. 675 (1985), upholding respondent's conviction for entering an air base in violation of a letter from the base commander barring him from doing so. This Court rejected Albertini's argument that his exclusion from the base during an open house was too broad a security precaution to satisfy First Amendment strictures, even while acknowledging that "there were conceivable alternatives to enforcing the bar letter . . . ." *Id.* at 688. The Court explained:

> [S]uch regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. . . . Instead, an incidental burden on speech is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.

Id. at 689 (citations omitted). The Court noted further:

> [In *Clark*], we observed that *O'Brien* does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." . . . We are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation.

Id. at 689 (citations omitted).

O'Brien also does not assign to the judiciary the role of managing university dormitories for purposes of creating the proper educational and social environment, protecting residents' privacy, maintaining sufficient security, and balancing concerns of staffing and cost. The area is one for experts:

> A total student housing program obviously has a combination of broad objectives which span business operations and management concerns as well as educational functions. The way in which these components are organized can have a dramatic effect upon the successful accomplishment of goals and priorities. Our concern is to be responsive to the total needs of students which include a comfortable, safe place to live, an adequate physical environment, as well as opportunities for learning. If management and educational personnel do not understand and appreciate each other's areas of specialization and expertise, they can often work at cross-purposes and, thus, make the total student housing program a self-defeating enterprise.

Student Development and Education in College Residence Halls 27 (D. DeCoster & P. Mable ed. 1974).

Predictive judgments are essential to the managerial decisions required in creating a residence hall environment that complements a university's academic mission. These expert forecasts are necessarily the province of the university's administrators, just as similar predictions by expert administrative agencies are not subject to second-guessing by the courts. *Cf. F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978) (certain factual determinations of a judgmental or predictive nature held necessarily to involve deductions based on agency's expert knowledge, complete

factual support in the record for the agency's judgment "is not possible or required," and Court of Appeals erred in holding those agency judgments arbitrary).

As Justice Stevens observed, concurring in *Widmar*:

> University facilities—private or public—are maintained primarily for the benefit of the student body and the faculty. In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. . . . In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.
>
> Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like "compelling state interest."

454 U.S. at 278-79 (footnotes omitted). SUNY's policy against using dormitory rooms for commercial sales meetings was adopted at the discretion of university officials who are uniquely situated to weigh the mix of local needs and conditions in residence halls. The policy passes muster under *O'Brien*, and should be sustained.

CONCLUSION

The Court of Appeals improperly assessed SUNY's regulation banning sales activities in its dormitories. The Second Circuit's misguided analysis has severe adverse implications for state institutions of higher education across the country. Its decision should be reversed.

Respectfully submitted,

Of Counsel:
SHELDON E. STEINBACH
General Counsel
AMERICAN COUNCIL
ON EDUCATION
Suite 800
One Dupont Circle, N.W.
Washington, D.C. 20036

RICHARD D. MARKS *
MICHAEL B. GOLDSTEIN
JANE B. BULBIN
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500
Counsel for Amici Curiae

* Counsel of Record

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioners,

vs.

TODD FOX, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

MARK J. BREDEMEIER
Counsel of Record
JERALD L. HILL
ELIZABETH A. HALL
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Counsel for Amicus Curiae Landmark Legal Foundation

Of Counsel:

JONATHAN W. EMORD
1255 Twenty-Third St., N.W.
Suite 800
Washington, D.C. 20037-1125
(202) 659-3494

December 20, 1988

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 87-2013

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Petitioners,

vs.

TODD FOX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation is a not-for-profit public interest law foundation committed to preserving the principles of individual rights, limited government, free enterprise, federalism, separation of powers, and strict construction of the United States Constitution. The Foundation, through original action litigation and

amicus curiae briefs, has fervently supported the right of individuals and businesses to freely exercise First Amendment rights in both political and commercial speech contexts. The Foundation has strenuously opposed undue state and federal government restrictions on, and impediments to, the free market system and the economic rights of all American citizens. The regulatory policy imposed by the Petitioners in this case represents just such an impediment.

Landmark Legal Foundation has appeared as *amicus curiae* before this Court in numerous cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this controversy.

SUMMARY OF ARGUMENT

It is time for the Court to revisit its tortuous pattern of ambiguous and result-oriented jurisprudence concerning the constitutional protection of commercial speech. Historically, and experientially, there is no justification for the distinction between, and the widely divergent standards of First Amendment protection afforded, commercial speech and political speech. In challenges regarding economic communication, this Court should require the government to establish that its interest in regulation is compelling,[1] that both the rationale for and effect of the

1. The terms "compelling" and "substantial" have sometimes been used interchangeably by the Court, but *Amicus* views "compelling" in a sense parallel to that sense in which it is used in political speech cases. *Amicus* would thereby insist on a standard which requires quantitative evidence of

(Continued on following page)

regulation are content-neutral, and that the restriction involved is narrowly tailored to attain and directly advance the state's interest. Under this exacting standard, Petitioners' economic regulation must be stricken.

Absent the articulation of a new standard, the Court should affirm the Second Circuit's holding that the *Central Hudson* precedent requires a commercial speech regulation to be the "least restrictive means" available to achieve the state's substantial governmental interest. This is consistent with the Court's recognition of the significance of commercial speech in this country's economic and political decisionmaking processes. Even under the less exacting standard of judicial review established in *Central Hudson*, Petitioners' sweeping bias against invited speech relating to commercial exchange, with its concomitant dissemination of economic ideas, fails to pass constitutional muster. At the very least, this Court should affirm the Court of Appeals' conclusion that Respondent students' First Amendment rights are not adequately protected by judicial scrutiny which demands anything less than the least restrictive means of regulating their access to economic information and opportunity.

Footnote continued—

the harm alleged or establishes that a perceived future harm poses an imminent and direct threat to public health and safety. The state's mere speculation as to harm is not and has not been found to be enough to support an infringement of commercial speech rights. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 & 771 (1976).

ARGUMENT

I.

PETITIONERS' POLICY PROHIBITING THE LAWFUL, NONMISLEADING COMMERCIAL SPEECH ACTIVITIES OF BUSINESS INVITEES IN STUDENT DORMITORY ROOMS VIOLATES THE FIRST AMENDMENT RIGHTS OF RESPONDENT STUDENTS.

We cannot truly enjoy a "marketplace of ideas"[2] in this country unless we are willing to undertake the painstaking efforts necessary to preserve a truly free "marketplace." *A free marketplace includes access to economic information.* We do not have a free marketplace, or free society, when government is permitted to intrude unduly into the private political and business affairs of its citizens and suppress desired economic information without a compelling interest clearly proven, *i.e.*, evidence establishing a direct causal link between the proposed restriction and the compelling state interest alleged to be advanced by the restriction. As this Court acknowledged in *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."

The importance of the free exchange of commercial ideas and information in a free economy was not lost on those who framed our constitutional society. It was

2. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.")

the intent of the Framers in protecting "the press" to safeguard the entire medium as they knew it, including the substantial commercial advertising elements which existed in the newspapers and prints of their time. In analyzing the political and commercial functions of the American press in the new nation period, Alexis de Tocqueville observed:

> In France, the space allotted to commercial advertisements is very limited, and the news-intelligence is not considerable; but the essential part of the journal is the discussion of the politics of the day. In America, three quarters of the enormous sheet are filled with advertisements, and the remainder is occupied by political intelligence or trivial anecdotes: it is only from time to time, that one finds a corner devoted to passionate discussions, like those which the journalists of France every day give to their readers.

A. de Tocqueville, *Democracy in America* 93 (Richard D. Heffner ed. 1956). The initial aims of the First Amendment were simple: deny government the power to silence a message in order to foster the private development of a marketplace of ideas, a marketplace where political decisionmaking and commercial intercourse were inextricably intertwined.

This first principle remains true today. In our society, federal and state government assumes an enormous role in affecting wages and prices and in regulating otherwise private commercial transactions. As a consequence of the government's expanded role in economic affairs, it is manifest that even the most basic commercial information—price information—affects political decision-

making. The consumer acqures knowledge about the existence of scarcity or inflation through prices. This price information, together with an economic assessment of the cause of price changes, often leads the consumer to make political choices regarding the selection of candidates, the adoption of insurance or health care propositions, and the future progress of our country. *See, e.g.*, Richards, *Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up In Smoke?*, 19 Pac. L.J. 1, 40-41 (1987) ("The simple fact is, the American citizen's voice in his or her society and government is no longer relegated to a ballot box on Election Day. We have become an economically based society in which we vote daily, through choices of products and services . . . . [We are] choosing, through those votes, the direction of this society's development as a whole and the industries which will employ us in the present and future."). Information concerning the price, quality and availability of goods and services may indicate the impact of excessive government regulation, price controls or subsidies. In every case, this commercial information enables citizens to be better informed about the economic environment in which they live. It also enables voters to understand the influence and import of public sector expansion upon the ability of each citizen to exercise free choice in our society.

This Court recognized the high value of commercial information in our political system in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977):

> [S]ignificant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant

> issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. . . .

Id. at 364. When a citizen makes a democratic choice, information of a predominantly commercial nature can be just as important as information of a predominantly political nature. Both are included as constitutionally protected speech in the marketplace, and both should be afforded a uniformly high degree of protection under the First Amendment.

The marketplace also includes the college campus. See Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969); *Fox v. Board of Trustees of State University*, 841 F.2d 1207, 1211 (2d Cir. 1988) (*citing Hazelwood School Dist. v. Kuhlmeier*, ... U.S. ....., ..., 108 S.Ct. 562, 567 (1988), *rev'g*, 795 F.2d 1368 (8th Cir. 1986)). University students, as other Americans, who seek commercial information have a right to receive it. *See, e.g., Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, ..., 106 S.Ct. 903, 907 (1986) (plurality opinion); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists . . . the [free speech] protection afforded is to the communication, to its source and to its recipients both."); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). *See* Redish, *Self-Realization, Democracy, And Freedom of Expression*, 130 U. Pa. L. Rev. 678, 686 (1982) ("[A]n individual's

faculties may develop by the receipt, as well as by the dissemination, of communication. . . . Should it matter, then, whether the motivation of the communicator is to develop his or her faculties or to make a profit?"). The question before this Court is: Does Petitioners' blanket prohibition against student access to commercial speech of business invitees result in an unconstitutional infringement of students' First Amendment rights?

Respondents are required to live on campus and in dormitory rooms. They simply desire access in the privacy of their room to lawful information solicited from non-disruptive business guests. They desire access to this information in accordance with the same standards as are applied by the university to all other guests on campus. Respondents do not challenge Petitioners' right to regulate classrooms and common areas. All other types of guests and speech are allowed in dormitory rooms, including speech from business visitors who discuss a subject matter without a commercial, or profit, message. A large number of universities and colleges in this country have refined school policies so as to regulate business invitees in the same manner as other guests or invitees.

However, rather than defend their broad policy as its relates to these students' rights, and confront the real constitutional issue in this case, Petitioners prefer to focus on, and denigrate, the commercial enterprise of the vender involved.[3] It is apparent that SUNY officials do not like

3. *See* Brief of Petitioner at 7-9. *See also Fox v. Board of Trustees, infra,* 841 F.2d at 1216 (Mahoney, J., dissenting). Petitioners even list the business invitee, American Future Systems, Inc., as a party to the proceedings though it has withdrawn from the suit as a plaintiff. Brief of Petitioner at ii.

the commercial activities at issue and even display a hostility toward business and free enterprise in general.[4] These officials presume that any interaction between a business invitee and a student is inherently disruptive and not to be allowed where there is profit potential. Nevertheless, both lower courts have held that the commercial speech at issue is lawful and not misleading. *Fox v. Board of Trustees of State University,* 841 F.2d 1207, 1213 (2d Cir. 1988); *American Future Systems, Inc. v. State University,* 565 F. Supp. 754, 763-64 (N.D.N.Y. 1983). Students required to live on campus and in dormitory rooms cannot, in this instance, be deprived of their right to free speech and the access to information they would be entitled to if they were living elsewhere. *See Board of Education v. Pico,* 457 U.S. 853, 868 (1982) (plurality opinion).

In the final analysis, nothing is gained by the suppression of a message but the maintenance of public ignorance. This result is particularly disturbing where we are attempting to prepare students "for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico, supra.* The government must be denied the power to silence a message absent a compelling state interest and the execution of a means carefully and narrowly tailored to attain that interest. This comports with the core values of the First Amendment. It best preserves our basic liberty to communicate ideas and information.

4. As Justice Holmes observed: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." *States v. Schwimmer,* 279 U.S. 644, 654-655 (1929).

Under the facts and circumstances of this case, Petitioners' commercial speech restriction contravenes this safeguard.

A. This Court Should Abrogate Its Arbitrary Distinction Between Commercial And Non-Commercial Speech, Apply In This Case A Strict Scrutiny Standard Of Review, And Strike Down Petitioners' Regulation.

Because "commercial" information is in many respects vital to effective participation in our democracy, there should be no clear distinction between the values of "commercial" and "political" speech. Previous Court precedent has presumed that the central import of the "marketplace of ideas" is the creation of an informed electorate, but, more often than not, further presumed that only political speech can inform the electorate. Yet, as discussed above, commercial speech is not only of great social utility, but also is of great value to the political decisionmaking process. No sound basis exists, either historically or within our contemporary system of governance, to endeavor to segregate commercial from political speech for purposes of First Amendment protection. The two supposedly distinct speech forms are, in fact, inextricably intertwined in their value, both as to the development of an individual's understanding of the markets which surround him and as to his informed participation in the democratic process.

In a world where actions of government daily influence the economy, we cannot exclude commercial speech from full First Amendment protection without causing our citizens to be deprived of information crucial to their full understanding of, and effective participation

in, our system of politics.[5] The Court should no longer review restrictions on commercial information in any different light than restrictions on political speech. Ultimately, this Court must do as it has done in the political speech context; it must trust in the dissemination of *more* information to enlighten the public as to those harms of less than a compelling health or safety nature. Rather than attempt to regulate away all potential harms—the definitions of which could change as often as do the composition of the legislatures—the government must rely on the exercise of individual choice to determine the economic outcome of a false or misleading message when that message does not have a causal nexus to a health or safety harm.

Unlike in the political context, where the courts place great faith in the marketplace of ideas for counterspeech to arise from competing voices in the search for truth, in the commercial context the courts place no faith in the marketplace of ideas. Yet commercial speech does com-

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5. Undeniably, as was recognized in *Virginia Board of Pharmacy, supra,* commercial speech also provides information which is as important to an individual's private pursuits as are his political activities. "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of information is indispensable." *Virginia Board of Pharmacy,* 425 U.S. at 765. "Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we cannot say that the free flow of information does not serve that goal." *Id.* (footnotes omitted). This principle has been proven by Professor Buchanan's Nobel Prize winning work which describes how public officials respond to economic concerns in much the same way businesses do. Buchanan concludes that almost any public policy decision can be understood in market terms. *See generally* J. Buchanan & G. Tullock, *The Calculus of Consent* (U. of Mich. Press 1960).

municate valuable ideas and competing enterprises have an economic incentive to expose falsehood, maintain a business reputation and avoid costly and potentially damaging criminal prosecution or civil litigation. The quest for political change is just as capable of inducing overreaching tendencies as the quest for profit. However, in neither case can overreaching be presumed as a universal condition warranting suppression of all speech.

The appropriate standard of judicial review for all speech, including commercial speech, is strict scrutiny. Under this analysis, a regulation must be justified by a "compelling" state interest and the means chosen must be narrowly tailored to attain the state's desired end. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 533-35 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). *See Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. ....., 106 S.Ct. 2968, 2982 (1986) (Brennan, J., dissenting) ("[W]here the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.").

In every case involving economic speech, the onus should be placed on the state's advocacy of suppressing a commercial message. A commercial speech regulation must be proven to serve a compelling state interest; it must be proven to be precisely drawn to serve that interest; it must be shown to be content-neutral. By protecting commercial speech in this manner, the Court will maximize consumer access to information. It will also make it incumbent upon government to rely on counterspeech and the marketplace of ideas in lieu of suppression

to counteract the effects of potentially false or misleading speech that does not threaten public health or safety. The government would have to vie[6] for consumer preference in these areas.

This balance, already struck in the political context, ensures the unencumbered propagation and dissemination of information and maximizes individual choice. It substitutes a policy of favoring the issuance of more information over one favoring the suppression of it. It ensures adequate protection of the core values of the First Amendment, and it places the ultimate power of decisionmaking over matters of choice in the mind of each individual rather than in government. As much as is possible, it denies government the power to silence a message, and it fosters the private development of a marketplace of ideas.

B. Absent The Adoption Of A Strict Scrutiny Standard Of Review For This Commercial Speech Case, This Court Should Affirm The Second Circuit's Holding That Petitioners' Regulation Failed To Satisfy The "Least Restrictive Means" Test Imposed By Central Hudson.

At the very least, the discussion above supports the conclusion that Petitioners' blanket prohibition on commercial speech infringed students' First Amendment rights under the intermediate scrutiny standard of *Central Hud-*

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6. "All totalitarians, all people who have suppressed freedom, have done so because of the arrogance of their believing that they knew what sin was. . . . [T]he real case for a free society and for freedom is ignorance—we cannot be sure we are right." Friedman, *Free Markets and Free Speech*, 10 Harv. J L. & Pub. Policy 1, 8 (1987).

son Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), and its "least restrictive means" burden on the government. In *Central Hudson*, this Court articulated a new standard for assessing the state's interest in suppressing a commercial message:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The Second Circuit found the first two prongs of the test satisfied by the facts in this case. *Fox v. Board of Trustees*, 841 F.2d at 1213. As to the third requirement, that Petitioners' regulation directly advances the State's interests, the court below presumed its existence though it was not "evident" that SUNY "offered sufficient evidence to meet its burden." *Id.* However, in reversing and remanding, the Court of Appeals did conclude that the fourth prong of the *Central Hudson* analysis imposed on government a "least restrictive means" test for reviewing commercial speech regulation. *Id.* at 1214. The Second Circuit stated that Petitioners' Resolution 66-156 survived the District Court's scrutiny below "because the First Amendment rights of students were ignored" and because the trial court's ultimate holding "was based only on the reasonableness of [Petitioners'] Regulation." *Id.*

The Second Circuit correctly reasoned that the "not more extensive than is necessary to serve [the state's] interest" language in *Central Hudson* requires the government's commercial speech regulation to be the "least restrictive means" available; the court noted that *Central Hudson* "makes clear that 'if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.'" *Id.* (*quoting Central Hudson*, 447 U.S. at 564). This standard is consistent with the significant role of commercial speech within the purview of First Amendment considerations discussed above. *See Project 80's, Inc. v. City of Pocatello*, 857 F.2d 592, 599 (9th Cir. 1988) ("Commercial speech is protected because of the value of its information to the consumer and to the public in our free market economy. . . . There is nothing in [the] nature of the information that renders it inappropriate for the [government] to restrict it unnecessarily. The very existence of the *Central Hudson* test, which arose in a context of commercial speech, suggests otherwise."). *See also City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1551-1553 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987). This "least restrictive means" burden is also consistent with prior Supreme Court precedent[7] assessing the constitutionality of regulations which im-

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7. The Second Circuit interpreted the *Posadas de Puerto Rico Associates* Court's deference to the legislature's assessment of the least restrictive effective measure as an implicit endorsement of that test. 841 F.2d at 1214 (*citing Posadas*, 106 S.Ct. at 2978). The result reached in *Posadas* can be distinguished on the unusual facts in the case. Although the commercial speech at issue was deemed legal, there existed significant public policy concerns involving potential corruption and "the disruption of moral and cultural patterns," 106 S.Ct. at 2977, as a result of the proposed casino gambling advertising. These interests fall within the general health and public safety effects test employed in past precedent.

posed burdens on First Amendment freedoms. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The trial court found "support in the record for [Respondent students'] position that a less restrictive measure might better balance the respective interests of the parties. . . ." *Fox v. Board of Trustees*, 649 F. Supp. 1393, 1402 (N.D.N.Y. 1986). Obviously, Petitioners' total ban against business invitees in private dormitory rooms is not the least restrictive means available to regulate the asserted governmental interests in campus safety, tranquility and education.[8] The record in this case documents the policies of other universities where commercial activities in dormitories are generally prohibited, *except* where salespeople are invited into a dormitory room voluntarily by the student. Once invited, the commercial visitor, and the speech associated with him or her, is treated no differently than any other type of visitor or speech. *See Project 80's, Inc.*, 857 F.2d at 597 (suggesting establishment of a central registry to protect privacy and prevent crime). Less restrictive alternatives will advance the interests asserted by Petitioners.

Petitioners cannot obstruct the "free flow" of commercial information without affording students an equally

8. The Court of Appeals also found "protection against consumer exploitation" to be a substantial state interest. 841 F.2d at 1213. This suggested justification for state regulation tends to ignore the significant presence of natural market pressures against exploitive business practices on campus and elsewhere. As an alternative to the "highly paternalistic approach" of Petitioners' broad prohibition, the Court should conclude that even college students "will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *See Virginia Board of Pharmacy*, 425 U.S. at 770.

viable "alternative channel" for communication. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92 & 93 (1977). Petitioners' remedy is "more speech, not enforced silence." *Id.* at 97 (*quoting Whitney v. California*, 274 U.S. 357, 377 (1927)). First Amendment protection extends to the "prohibition of public discussion of an entire topic," not merely to government bias in the suppression of a particular viewpoint. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980).

Petitioners' Resolution 66-156, and their interim regulation, go too far. This policy is not the least restrictive means by which the state may regulate the important and protected entrepreneurial speech at issue.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

MARK J. BREDEMEIER
Counsel of Record
JERALD L. HILL
ELIZABETH A. HALL
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Counsel for Amicus Curiae
Landmark Legal Foundation

Of Counsel:

JONATHAN W. EMORD
1255 Twenty-Third St., N.W.
Suite 800
Washington, D.C. 20037-1125
(202) 659-3494

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AMICUS CURIAE

BRIEF

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BRIEF OF THE AMERICAN ADVERTISING FEDERATION, INC., THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., AND THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AS AMICI CURIAE

WILLIAM W. ROGAL
2000 L Street, N.W.
Washington, D.C. 20036
(202) 872-8103

Counsel for the American Advertising Federation, Inc.

GILBERT H. WEIL
WEIL, GUTTMAN & MALKIN
60 East 42nd Street
New York, New York 10165
(212) 687-8573

Counsel for the Association of National Advertisers, Inc.

DAVID S. VERSFELT*
KEVIN G. MULCAHY
DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 632-3000

Counsel for the American Association of Advertising Agencies, Inc.

* Counsel of Record

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CONSTITUTIONAL PROVISION AND REGULATION

The First Amendment to the Constitution of the United States:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The State University of New York Resolution 66-156, as amended by Resolutions 73-26 and 79-100:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2013

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, et al.,

Petitioners,

—v.—

TODD FOX, et al.,

Respondents.

BRIEF OF THE AMERICAN ADVERTISING FEDERATION, INC., THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., AND THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AS AMICI CURIAE

With the consent of the parties, the American Advertising Federation, the American Association of Advertising Agencies, and the Association of National Advertisers submit this brief as *amici curiae* in support of the respondents, urging affirmance of the decision of the United States Court of Appeals for the Second Circuit.

INTEREST OF AMICI CURIAE

The American Advertising Federation, Inc. (A.A.F.) is a national trade association which is comprised of various elements of the advertising industry. Its membership includes 190 companies which produce and advertise consumer products,

advertising agencies, magazine and newspaper publishers, radio and television broadcasters, radio and television networks, outdoor advertising organizations, and other media. Approximately 21 national trade associations and 225 local advertising clubs/federations with 38,000 members engaged in advertising pursuits are also members of A.A.F. Of particular significance in this case is the fact that 160 college chapters, composed of 5,000 students, are members of A.A.F.

The American Association of Advertising Agencies, Inc. (A.A.A.A.) is a New York not-for-profit corporation which serves as the national association of the advertising agency business. Its members include more than 750 advertising agencies located throughout the United States, with offices throughout the world. As experts in the art of communication, A.A.A.A. agencies handle most national advertising placed by advertising agencies, and an increasing amount of local and regional advertising.

The Association of National Advertisers, Inc. (A.N.A.) is a New York not-for-profit trade association. Its membership represents the vast majority of national and regional advertisers in the United States—not advertising agencies or media, but companies that advertise the products and services they sell. That membership includes roughly 300 companies and their more than 2,000 subsidiaries and divisions, many of which are relatively independent advertiser entities. These companies sell a wide range of products and services and use advertising as an important element of their marketing and public relations functions.

Each of these trade associations consists of individuals and entities possessing an expertise in commercial communication. Each has a direct and continuing interest in maintaining channels of commercial speech unimpeded by governmental abridgements which would affect the right of advertisers to provide—and the public to receive—information regarding products and services.

STATEMENT OF THE CASE

Many students at the State University of New York (SUNY) live in college-operated dormitories. Most of the dormitories operate with unlimited visitation hours, but SUNY students are prevented from inviting into their dormitory rooms representatives of commercial enterprises or persons who furnish information, provide a product, or provide a service where a fee is charged or a profit involved. That absolute prohibition is contained in Resolution 66-156, which, as twice amended, reads as follows:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

In 1982, a representative of a company which sells cookware, china, crystal, and silverware to collegians by means of group demonstrations arranged by students was arrested for trespass and other misdemeanors after refusing to leave a dormitory room to which she had been invited for purposes of a product presentation. The company and a SUNY student brought suit challenging the constitutionality of Resolution 66-156.

In 1983, applying the analysis of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the federal district court preliminarily enjoined SUNY from prohibiting product demonstrations in the dormitory rooms of consenting students. *American Future Systems, Inc. v. State Univ. of New York, Cortland*, 565 F. Supp. 754 (N.D.N.Y. 1983). In response, at least one campus within the SUNY system promulgated significantly less restrictive regulations than the absolute ban contained in Resolution 66-156.[1] However, in

1 SUNY-Cortland's "interim" regulations forbid sales—but not sales presentations—on campus, restrict sales presentations to certain hours, confine presentations to student rooms where all roommates have given written permission, limit the number of presentation participants to ten, and require the resident host to complete a registration form and to be present throughout the demonstration.

1986, following a bench trial, the district court eschewed the *Central Hudson* standards and found Resolution 66-156 to be an acceptable restriction when evaluated under a limited public forum analysis. *Fox v. Bd. of Trustees of State Univ. of New York*, 649 F. Supp. 1393 (N.D.N.Y. 1986). The court conceded that less restrictive measures could have furthered the intended purposes of the ban, but held that the regulation "need only be reasonable" to withstand scrutiny. *Id.* at 1402.

On appeal, the United States Court of Appeals for the Second Circuit reversed. *Fox v. Bd. of Trustees of State Univ. of New York*, 841 F.2d 1207 (2d Cir. 1988). The Second Circuit rejected the public forum analysis utilized by the district court and held that the four-part commercial speech standard set forth in *Central Hudson* must be applied. The court of appeals then remanded the case to the district court to make the appropriate findings under the *Central Hudson* analysis. *Id.* at 1214.

In a decision handed down on the same day that this Court granted the petition for *certiorari*, the district court, on remand, struck down Resolution 66-156 under the *Central Hudson* standard. It found that petitioners had not sustained their burden of proving that the Resolution was the least restrictive means for advancing the State's proffered interests in light of the testimony in the record that other means—less restrictive than a total ban—could be implemented.[2] *Fox v. Bd. of Trustees of State Univ. of New York*, 695 F. Supp. 1409 (N.D.N.Y. 1988).

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2 The district court placed particular importance on the testimony of Howard Diamond, an administrator at the University of Illinois. Professor Diamond testified that the policy of that campus is to prohibit commercial activities in the dormitories, but to allow students to invite salespeople into their rooms if they so choose. Such commercial visitors are then treated no differently than other invited visitors. The court also noted that the record was devoid of testimony by SUNY to show why a similar policy could not be implemented on SUNY campuses.

SUMMARY OF ARGUMENT

Amici submit (i) that the Second Circuit properly construed *Central Hudson* and its progeny to require that the restriction on commercial speech imposed by the State University of New York constitute the least restrictive means available for serving the State's interests, and (ii) that the district court, on remand, did not err in finding that SUNY had failed its burden of proving that its restriction was the least restrictive means available to serve the State's interests.

ARGUMENT

I. THE SECOND CIRCUIT PROPERLY CONSTRUED *CENTRAL HUDSON* AS REQUIRING THAT A RESTRICTION ON COMMERCIAL SPEECH BE THE LEAST RESTRICTIVE MEANS AVAILABLE FOR SERVING THE STATE'S INTERESTS.

In *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980), this Court established a four-prong standard which must be met by any entity seeking to restrict the flow of commercial speech. The fourth prong of that standard requires that for a restriction on commercial speech to survive First Amendment scrutiny, the regulation must be "*not more extensive than is necessary*" to serve a substantial governmental interest. *Id.* at 566 (emphasis added). Restating this requirement—and making its meaning explicitly clear—the *Central Hudson* Court explained that "*if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.*" *Id.* at 564 (emphasis added). *Central Hudson* thus established beyond dispute that a restriction on commercial speech must be the "least restrictive" of all alternative restrictions which would serve the State's interest as well. Furthermore, *Central Hudson* made clear that the burden was on the proponent of the restriction to make a

"showing . . . that a more limited restriction on the [commercial speech] would not serve adequately the State's interests." *Id.* at 570.

Despite the clarity of *Central Hudson*, petitioners assert that the fourth prong of the *Central Hudson* analysis does *not* impose a "least restrictive means" requirement. Rather, posit petitioners, *Central Hudson* requires only that a restriction on commercial speech be "narrowly tailored" to serve the interest of the State. Pet. Br. at 18-21.

> *Central Hudson* itself does not impose a least restrictive means test. Rather, applying an intermediate level of scrutiny, it requires only that a restriction on commercial speech be "no more extensive than is necessary to serve" a substantial government interest. 447 U.S. at 566. In other words, the restriction must be "narrowly drawn". 447 U.S. at 565.

Pet. Br. at 20-21. Petitioners make no attempt to explain how the formulation "no more extensive than is necessary" differs from "least restrictive means." *Central Hudson* certainly offers no basis for any difference. Indeed, the *Central Hudson* Court explicitly stated that "if the governmental interest could be served as well by a *more limited restriction* on commercial speech, the *excessive* restrictions cannot survive." 447 U.S. at 564 (emphasis added). Moreover, the *Central Hudson* Court emphatically specified that "[t]he regulatory technique may extend only as far as the interest it serves," and that a State cannot suppress information "when narrower restrictions on expression would serve its interest as well." 447 U.S. at 565. Clearly, *Central Hudson* establishes that a State is obligated to choose the regulatory alternative that is the "*least restrictive*"—of all effective alternatives—on First Amendment rights.

Petitioners' argument that the phrase "least restrictive means" places a more onerous burden of justification upon censors of commercial speech than do the words "no more extensive than necessary" is a semantic *tour de force*, notable

for its technique but not for its substance. Despite their attempt to cloud the issue, both formulations are synonymous.

This Court since *Central Hudson* has consistently applied the fourth prong as a "least restrictive means" standard. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), in upholding a city restriction on billboard advertisements, this Court found that the restriction in question had satisfied the fourth prong of *Central Hudson* because it was "*the most direct and perhaps the only effective approach* to solving the problems . . . ." *Id.* at 508 (emphasis added). Further, this Court observed that the restriction had gone "*no further than necessary* to meet its ends." *Id.* (emphasis added). Also, in *In re R.M.J.*, 455 U.S. 191 (1982), this Court applied the *Central Hudson* standard and struck down a prohibition on the mailing of attorney office announcements because there was no evidence "that an absolute prohibition is the only solution" and that "[t]here is no indication in the record of a failed effort to proceed along . . . a *less restrictive path*." *Id.* at 206 (emphasis added).

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), this Court applied the least restrictive means test of *Central Hudson* to invalidate a postal regulation which prohibited the mailing of advertisements for contraceptives, stating that "a restriction of this scope is *more extensive than the Constitution permits.*" *Id.* at 73 (emphasis added). Again, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), an attorney advertising restriction was invalidated because the State, under the *Central Hudson* standard, had failed "to demonstrate that the restriction vindicates [the State's] interest through the *least restrictive available means.*" *Id.* at 647 (emphasis added). Most recently, in *Shapero v. Kentucky Bar Ass'n*, ____ U.S. ____, 108 S. Ct. 1916 (1988), this Court applied *Central Hudson* and struck down a restriction on direct mail efforts by attorneys because "[t]he State can regulate . . . abuses and minimize mistakes through far *less restrictive and more precise means.*" *Id.* at 1923 (emphasis added).

Thus, contrary to petitioners' assertions, this Court has continually reaffirmed that *Central Hudson* imposes a "least restrictive means" standard. Moreover, this Court has also consistently reaffirmed *Central Hudson*'s requirement that the *proponent* of a restriction on commercial speech *prove* that the restriction is the least restrictive means that would effectively serve the State's interests. *Central Hudson*, 447 U.S. at 570; *Bolger*, 463 U.S. at 71 n.20 ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."); *Zauderer*, 471 U.S. at 647 ("[T]he burden is on the State . . . to demonstrate that the restriction vindicates [the] interest through the least restrictive available means.").

Petitioners rely on this Court's decision in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), a case involving casino advertising restrictions, which petitioners describe as "irreconcilable with a least restrictive means test." Pet. Br. at 24. For several reasons, petitioners' reliance on *Posadas* is misplaced. First, petitioners implicitly maintain that the "least restrictive means" test has not been applied since *Posadas*, yet *Shapero* refutes that assertion. Second, in *Posadas*, this Court utilized precisely the same verbal formulation of the fourth prong as was used in *Central Hudson*: the "regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions are *no more extensive than necessary to serve the government's interest*." *Id.* at 343 (emphasis added). Third, while the *Posadas* Court chose to recognize the judgment of the Legislature of Puerto Rico regarding whether a policy of "counterspeech" would constitute a viable means of regulation, petitioners have closed their eyes to the fact that the *Posadas* Court stated *its own* determination that the legislative conclusion was a soundly based determination of the least restrictive effective means: "The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." *Posadas*, 478 U.S. at 344. Thus, contrary to petitioners' assertions that the *Posadas* Court accepted the legislature's judgment "without

scrutiny," Pet. Br. at 24, the *Posadas* court did indeed apply scrutiny, and that scrutiny was consistent with this Court's traditional analysis of factual, as well as legal, bases for governmental incursions upon commercial advertising. *See, e.g., Bolger*, 463 U.S. 60; *Friedman v. Rogers*, 440 U.S. 1 (1979); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).[3] The *Posadas* decision clearly did *not* give the Legislature of Puerto Rico discretion to choose a more restrictive means over an equally effective less restrictive means. Finally, fourth, petitioners' assertion that the First Amendment should be satisfied by some sort of loose "narrowly drawn" test, Pet. Br. at 21, is significantly undercut by this Court's recognition in *Posadas* that the "least restrictive means" test of *Central Hudson* under the First Amendment constitutes a higher standard than the "rational basis" test appropriate in an Equal Protection context—a standard which petitioners would presumably equate with the "narrowly tailored" standard they claim to find in *Central Hudson*. 478 U.S. at 344 n.9; *see Fox v. Bd. of Trustees of State Univ. of New York*, 841 F.2d 1207, 1214.[4]

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3 These cases all follow the broader principle that "[w]hen Constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record." *Brookhart v. Janis*, 384 U.S. 1, 4 n.4 (1966) (citations omitted).

4 Apart from *Posadas*, the only case petitioners assert as support for their proposition that the First Amendment does not require a "least restrictive means" test is a decision of the Court of Appeals for the Third Circuit, *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985). Pet. Br. at 21. However, the Third Circuit in that case did no more than *assume* what this Court's analysis might be; and both the Ninth and Second Circuits have explicitly rejected that assumption. *Project 80's, Inc. v. City of Pocatello*, 857 F.2d 592, 597 n.4 (9th Cir. 1988); *Fox v. Bd. of Trustees of State Univ. of New York*, 841 F.2d 1207 1214. Moreover, the Third Circuit, in relying on this Court's use of the "narrowly tailored" standard in *Clark v. Community for Non-Violence*, 468 U.S. 288 (1984), ignored the fact that *Clark* involved a "time, place and manner" restriction; whereas, the present case, like all cases in which *Central Hudson* has been applied, involves a "com-

Because *Central Hudson* clearly imposes a least restrictive means requirement, the Second Circuit was correct to remand this case to the district court for an evaluation of Resolution 66-156 under that standard. Further, on remand, the district court was correct to find that SUNY had failed to meet the *Central Hudson* standard because SUNY made no showing that a less restrictive policy could not effectively serve its interests.

II. COMMERCIAL SPEECH MAY NOT BE DENIED BROAD FIRST AMENDMENT PROTECTION BASED ON AN ASSERTION OF "IMPERMISSIBLE PARITY" WITH NON-COMMERCIAL SPEECH.

Petitioners' argument reduces to an assertion that commercial speakers must be denied virtually all facets of First Amendment protection. Such a demotion to almost unprotected status, however, is clearly repugnant to the spirit of the First Amendment, and is in direct conflict with well-established case law. The First Amendment encompasses commercial as well as political speech, *see, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and aside from a limited accommodation recognizing a difference between advertising and "core" subjects of speech, the First Amendment's protection of each type of speech must be the same.

This Court has been careful to define the First Amendment protection available to commercial speech. In *Virginia Pharmacy*, this Court explained that a certain lack of parity between commercial and non-commercial speech under the First Amendment is created by the fact that commercial speech, unlike other types of speech, is denied First Amendment protec-

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mercial speech" restriction. Certainly, "laws regulating time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Assoc. Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977). *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984); *but see City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987). Petitioners' attempt to blend the distinctive standards for their convenience does violence to established First Amendment doctrine.

tion if it is deceptive, misleading, or for an unlawful product or service. *Virginia Pharmacy*, 425 U.S. at 771 n.24.[5] Once that hurdle is cleared, however, the remaining First Amendment protections are fully available to commercial speech. Indeed, such protection follows inevitably from the holdings of *Virginia Pharmacy* and its progeny, which recognize advertising's virtual equivalence to "political" speech.

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen. if not keener by far, than his interest in the day's most urgent political debate . . . .
>
> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral service for legal abortions are available, *Bigelow v. Virginia*, *supra*; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc. v. E. F. Timme & Son*, 346 F. Supp. 16 (S.D.N.Y. 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, cf. *Chicago Joint Board v. Chicago Tribune Co.*, 435 F.2d 470 (C.A.7 1970), *cert. denied*, 402 U.S. 973 (1971). Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added . . . .
>
> Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could

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5 "Thus, while the First Amendment ordinarily prohibits regulation of speech based on the contents of the communicated message, the government may regulate the content of commercial speech in order to prevent the dissemination of information that is false, deceptive, or misleading . . . or that proposes an illegal transaction." *Posadas*, 478 U.S. at 349-50 (Brennen, J., dissenting) (citations omitted).

> ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia Pharmacy, 425 U.S. at 763-65. *See also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 473-74 (1978) (Marshall, J., concurring); *Friedman v. Rogers*, 440 U.S. 1, 22-23 (1979) (Blackmun, J., dissenting); *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 561-62 (1980).

In light of the social importance of the free flow of information in our society, it is vital that "the method by which speech is sought to be restrained . . . be subjected to close analysis and critical judgment in light of the particular circumstances to which it is applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958), *cited with approval in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 778 (1985). *Amici* submit that this is the reason why this Court's decisions have protected commercial speech from a wide variety of unwarranted restrictions. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (contraceptive advertising); *Central Hudson*, 447 U.S. 557 (electric utility advertising); *In re R.M.J.*, 455 U.S. 191 (1982) (attorney advertising); *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60 (1983) (contraceptive advertising); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (attorney advertising). As repeatedly confirmed by this Court: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, 455 U.S. at 203.

CONCLUSION

The constitutional right of free expression is a critical component of our nation's liberties. This right should not lightly be restricted, even in seemingly minor ways, not only because of the direct injury to free speech in the particular context, but also because judicial sanction of suppression in one context may pave the way for assaults on speech in others.

Amici submit (i) that the Second Circuit properly construed *Central Hudson* to require that petitioners' restriction on commercial speech constitute the least restrictive means available for serving the State's interests, and (ii) that the district court was correct in finding that SUNY did not meet its burden under *Central Hudson* to prove that Resolution 66-156 was the least restrictive means available for serving the State's interests.

December 21, 1988

David S. Versfelt, Counsel of Record
Kevin G. Mulcahy
DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 632-3000
Counsel for the American Association of Advertising Agencies, Inc.

William W. Rogal
2000 L Street, N.W.
Washington, D.C. 20036
(202) 872-8103
Counsel for the American Advertising Federation, Inc.

Gilbert H. Weil
WEIL, GUTTMAN & MALKIN
60 East 42nd Street
New York, New York 10165
(212) 687-8573
Counsel for the Association of National Advertisers, Inc.

AMICUS CURIAE

BRIEF

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JOSEPH F. SPANIOL, JR.
CLERK

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In The

Supreme Court of the United States

October Term, 1987

BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,
Petitioner,

v.

TODD FOX, EDWARD R. DETWEILLER, STEPHANIE VIANO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF AMICUS CURIAE THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.; ARIZONA STUDENTS' ASSOCIATION; CALIFORNIA STATE STUDENT ASSOCIATION; COLORADO STUDENT ASSOCIATION; CONNECTICUT STUDENT ASSOCIATION; MICHIGAN COLLEGIATE COALITION, INC.; OREGON STUDENT LOBBY; RUTGERS COLLEGE GOVERNING ASSOCIATION; RUTGERS UNIVERSITY LEGISLATIVE AFFAIRS COUNCIL; UNITED COUNCIL OF UNIVERSITY OF WISCONSIN STUDENT GOVERNMENT, INC. IN SUPPORT OF RESPONDENTS

LANNY E. WALTER
Counsel of Record
ANITA THAYER

WALTER, THAYER, LONG & MISHLER, P.C.
One Columbia Place
Albany, New York 12207
(518) 462-6753

December 20, 1988

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QUESTION PRESENTED

Did the Second Circuit correctly rule that students have a First Amendment right to use their dormitory rooms as others use their private homes or apartments for all varieties of the exercise of free speech and association without government intrusion, censorship, restraint or banning?

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MISCELLANEOUS:

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No. 87-2013

In The
Supreme Court of the United States
October Term, 1987

The Board of Trustees of the State University of New York, *et al.*,

Petitioner,

v.

Todd Fox, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.

INTRODUCTION

The Student Association of the State University of New York, Inc. (SASU) endorses and supports the position of the student respondents in the above-captioned case.

This brief is presented to the Court with the consent of the parties to the action. Copies of their letters of consent have been filed with the Clerk of the Court.

The Student Association of the State University of New York, Inc. (SASU), was founded in 1970 and rep-

resents the interest of 380,000 students of the State University system.

The functions of SASU are to represent, advocate and further the interests and welfare of the students of the State University of New York. SASU does this by lobbying in the New York State Legislature and the Executive Branch on behalf of students, litigating issues of students' rights and developing programs for purposes which benefit students of the State University of New York. Traditionally, the student member of the Board of Trustees of the State University of New York is the President of the SASU.

SASU is committed to protecting and expanding the rights of college and university students. SASU has a particular interest in eliminating the remaining vestiges of *in loco parentis* policies in the State University system.

The Appendix to this Brief details the interest of the other amici student associations. The student organizations joining in this brief include 10 state-wide student associations and represent the interest of over a million and a half (1,500,000) students.

Of the 64 campuses in the New York State University system, approximately 25 campuses, including all of the largest colleges and universities, have state-owned dormitories. One or two campuses have privately owned dormitories.

At issue is the constitutionality of Resolution 66-156 of the Board of Trustees of the State University of New York, as amended by Resolutions 73-26 and 79-100:

> No authorization will be given to private commercial enterprises to operate on the State University cam-

> puses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events. This resolution shall not be deemed to apply to Auxiliary Service Corporation activities approved by the University.

The constitutional issue at stake here arises from SUNY's application and interpretation of this regulation. The real vice here stems from the way the above regulation, which on its face, seems both sensible and harmless, yet, has been interpreted and applied as a total ban on certain kinds of speech, thereby infringing *pure free speech*, as well as the students' constitutionally protected right to listen to *commercial speech* by invitees of their choice.

At trial the parties stipulated that the SUNY regulation at issue prevents SUNY students from inviting into their dormitory rooms commercial enterprises or persons who furnish information, provide a product, or provide a service where a fee is charged or a profit involved. Students are prohibited from inviting and communicating with lawyers, women's health counselors, physicians, job counselors, stock brokers, etc. Record at 113-115, 373-77, 485-87.

Amici note with some alarm the Amici Curiae Brief submitted by the Board of Trustees of the University of Alabama, *et al.*, which incorrectly states that all amici have regulations or practices similar to SUNY which they wish to protect.[1] In fact, at least some of the campuses, and

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[1]Since SUNY's brief has so boldly misrepresented the issues and record in this case, as clearly demonstrated by respondents' brief, it seems likely that many of the institutions were unaware of the real legal issues and the factual circumstances of this case.

in many cases the complete university system allows student dormitory residents to have commercial invitees in the manner in which the student plaintiffs have sought in the case herein.

Specifically, this is true of the University of California, Michigan State University, University of New Hampshire, University of North Carolina, Rutgers, University of South Carolina and the University of Vermont.

The University of Florida and the University of Michigan permit access by commercial invitees, but with a bit more regulation.

It would have been more helpful for these colleges and universities to have forthrightly explained their regulations so the true university experience with commercial invitees would be more completely before the Court.

Although SUNY can articulate eloquent and lofty goals for dormitory living, the principle role of student dormitories on college and university campuses is quite simple, i.e., to provide a home for students while they attend college. A dormitory room is a home for a student.

In 1972, the Board of Trustees of the State University of New York (SUNY), the petitioner herein, directed all campuses to require mandatory dormitory living. Individual campuses can opt out of this requirement in certain circumstances. Students enrolled at campuses that do enforce mandatory dormitory living must reside in the state-owned dormitories as a condition of enrolling in these particular colleges. Only students who are bona fide "commuters" are exempt from mandatory dormitory living.

The SUNY Board of Trustees has also embarked on a policy of "privatization" of the dormitories. In 1980, by resolution, the Board approved a policy of economic self-sufficiency for the dormitories. Resolution 80-121 of the Board of Trustees. The actual implementation of self-sufficiency was delayed until the 1985-86 fiscal year. This policy directs SUNY's colleges and universities to operate, maintain, and repair (including debt service) the dormitories on each of their campuses solely from funds paid by dormitory revenues. Rental rates are directed by the local housing market. The traditional taxpayer subsidy of state-owned dormitories has been eliminated. The resulting dormitory rate increases have varied from campus to campus, but SASU's projections are that the adoption of financial self-sufficiency will significantly increase the cost of public higher education in the near future.

The operating expenses for SUNY'S dormitories are paid for by student "rents" not by taxpayers. These "rents" are increasing each year as a result of inflation and increases in operating expenses the same way apartment rents increase regularly. Even though SUNY no longer provides a financial subsidy for students, they are still insisting on withholding basic First Amendment rights under the guise of student "protection".

I. THE SECOND CIRCUIT CORRECTLY RULED THAT STUDENTS HAVE A FIRST AMENDMENT RIGHT TO USE THEIR DORMITORY ROOMS AS OTHERS USE THEIR PRIVATE HOMES OR APARTMENTS FOR ALL VARIETIES OF THE EXERCISE OF FREE SPEECH AND ASSOCIATION WITHOUT GOVERNMENT INTRUSION, CENSORSHIP OR RESTRAINT

The primary issue presented in this litigation is whether or not college and university students who live in campus dormitories are afforded the broad panoply of First Amendment rights of free association and free speech. *See Fox v. Board of Trustees of the State University at New York*, 841 F.2d 1207 (2d Cir. 1988).

In New York State, the Legislature has recognized the adulthood of college-aged persons by establishing the age of 18 years as the minimum voting age and the minimum age to consent to marriage. (N.Y. Election Law § 5-102, N.Y. Domestic Relations Law § 7.) The Legislature has also recognized the maturity of college students by permitting the SUNY students to select a Student Trustee who is a full member of the SUNY Board of Trustees. N.Y. Education Law § 353(4).

The Twenty-Sixth (26th) Amendment to the United States Constitution establishes the right to vote for all citizens age 18 or older. Similarly 50 App U.S.C. § 453 requires all men to register for the draft at the age of 18 years.

Certainly, a college-aged person who is trusted with the right to vote and the duty to defend our country is mature enough to be responsible for choosing whom to invite to his/her room.

Students live in dormitories for a variety of reasons. For some, as stated above, SUNY requires they live there. For others, the greater expense of private housing is prohibitive or there is an insufficient supply of private housing available; and for still others, the opportunity to meet and socialize with other students is the primary motivation for their decision to live in state-owned dormitory housing. Regardless of the reason a student chooses (or is forced) to live in a dormitory, he/she should not be forced to relinquish his/her First Amendment rights to freedom of speech and freedom of association.

Nor should a student, not unlike residents of apartments and private homes, be required to subjugate his home to the strained results of a public forum/limited public forum/non-public forum analysis as was done in the District Court ruling. *Fox v. State University of New York*, 649 F. Supp. 1393 (N.D.N.Y. 1986).

Dormitory residents are each given a key to their dormitory room. They have reasonable expectations that they will enjoy the right of privacy and that they—not their landlord—will control and/or invite visitors to their dormitory room. A dormitory room simply does not fit into the public/non-public forum dichotomy.

The right of a resident to control information flowing into his home is a well-established constitutional principle. This includes a right to receive information as well as a right not to receive information. This Court has clearly held, for example, that the "right" to communicate must stop at the mailbox of an unreceptive addressee. *Rowan v. U.S. Post Office*, 397 U.S. 728 (1970). Also see *Stanley v. Georgia*, 394 U.S. 557 (1967).

For students living on the university campus, the dormitory is their home. A dorm room is where a student keeps his/her clothing and personal items. It is a place to entertain guests, enjoy a spare moment, and sort one's laundry. It is a place for living. Irrespective of its exact lay-out it serves both as a bedroom and a living room. Within his/her home each student is entitled to the constitutional protection that surrounds a private space.

"University students are adults. The dorm is a home. . . . To suggest a student who lives off campus in a boarding house is protected, but that one who occupies a dormitory room waives his constitutional liberties is at war with reason, logic, and law." *People v. Cohen,* 57 Misc. 2d 366, 292 N.Y.S. 2d 706, 713, *aff'd,* 61 Misc. 2d 838, 306 N.Y.S. 2d 788 (1969).

"A dormitory room is a student's home away from home. . . . *Morale v. Grigel,* 422 F.Supp. 988, 997 (D.N.H. 1976). See also *Piazzola v. Watkin,* 442 F.2d 281 (5th Cir. 1971).

The New York State Board of Trustees would not be able to prohibit students from inviting American Future Systems or any other lawful group into their off-campus homes. The students who are required, or choose, to live on campus are entitled to the same degree of freedom of speech and freedom of association that is available to other adults in our society.

II. THE UNIVERSITY'S BAN ON COMMERCIAL ACTIVITY IN THE DOMITORIES DOES NOT DIRECTLY ADVANCE A SUBSTANTIAL GOVERNMENTAL INTEREST AND IS MORE EXTENSIVE THAN NECESSARY TO SERVE ANY PROFFERED INTEREST.

The First Amendment speech and association rights of the students to receive commercial speech can only be infringed upon by the defendants upon proof that a substantial government interest is advanced by said regulation, and proof that said regulation is not more extensive than necessary. See *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980).

SUNY asserts substantial government interests: (1) prevention of crime, (2) protection against consumer exploitation, (3) preservation of residential tranquility, and (4) promotion of education.

However, in actual substance, petitioner simply seeks to apply the obsolete *in loco parentis* doctrine without showing any rationale connection between the interest asserted and the restrictive SUNY policy at issue. This is clear in the remand decision of this case. The regulation removing from the student resident the right to invite any guest motivated by profit to their home is "more extensive than necessary" and may not even advance SUNY's stated purposes. *Fox v. State University of New York at Albany,* 695 F. Supp. 1409 (N.D.N.Y. 1988).

Student dormitory residents do not need a ban on so-called commercial activity in the dormitories to protect them from commercial exploitation. New York State has been in the forefront of providing consumer protections

to its residents. Dormitory students benefit from these protections as do all New York State residents. For example, N.Y. Personal Property Law §§ 425 *et seq.* provides that any door-to-door sale of $25.00 or more may be cancelled within three (3) business days for any reason without penalty. This statute includes sales at home parties and "group demonstrations" such as those utilized by American Future Systems, Inc.

New York also has consumer laws that make certain deceptive business practices illegal. See N.Y. General Business Law §§ 349 *et seq.* Also see N.Y. General Obligations Law § 8-702, which mandates "plain language" in business contracts. Students are also protected by the U.S. Consumer Protection Safety Act, 15 U.S.C. §§ 2051-2082.

The residential character of the dormitories is not changed by the proposed activity at issue in this litigation and is not incompatible with its stated use. Invitational home parties, similar to those banned by petitioner's resolution are a frequent occurrence in residential neighborhoods and other residential settings.

In its eagerness to interject itself into the lives of its students and control their activities inside the dorm room, SUNY has promulgated a very broad "overkill" policy which bans any invitee of a student who may derive some income or profit from the event. The policy as applied in much broader than the "commercial enterprise" language of the Trustee policy.

As applied, the challenged regulation is not limited to unsolicited, or disruptive speech or speakers. The

SUNY ban is not limited to speech taking place in the classrooms, libraries, hallways or other areas on campus where SUNY may have a legitimate interest in regulating speech. Instead, it extends across the entire campus and into the inner sanctum of a student's campus home, an area where the state has no legitimate interest in regulating lawful, safe and non-disruptive speech.

These college dormitory rooms have been rented, leased and/or made available to students for their use as a home. The individual dormitory resident should be the person who decides who he/she will invite into that room—not the landlord.

The SUNY Regulation survived constitutional scrutiny at the district court level only because the constitutional rights of students were ignored and the "forum" construct was literally applied to a private room. See *Fox v. Board of Trustees of the State University of New York*, 649 F. Supp. 1393 (N.D.N.Y. 1986).

The District Court left unaddressed the controversy between the student resident/tenants and their "landlord". The Second Circuit decision properly focused this litigation on the rights of students who live in dormitories, and wish to invite commercial speech into their dormitory room.

> [S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment . . . [There is] no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community

of American schools. *Healy v. James,* 408 U.S. 169 (1972).

CONCLUSION

WHEREFORE, The Student Association of the State University of New York, Inc., and other named amici, respectfully asks the Supreme Court to affirm the Second Circuit decision.

Respectfully submitted,

LANNY E. WALTER
Counsel of Record

ANITA THAYER
WALTER, THAYER, LONG
& MISHLER, P.C.
One Columbia Place
Albany, New York 12207
(518) 462-6753

APPENDIX

STATEMENTS OF INTEREST

ARIZONA STUDENTS' ASSOCIATION

The Arizona Students' Association is a statewide student government association that represents the interests of over 93,000 university students throughout Arizona. Members include the student bodies of Arizona State University, Northern Arizona University and the University of Arizona.

ASA was founded in 1974 and incorporated in 1977 for the purpose of advocating the student viewpoint to elected officials, members of the Arizona Board of Regents and campus administrators in matters of statewide educational interest.

ASA is funded through membership fees paid by the individual student government of each of the three universities. The Board of Regents authorizes this form of funding and approves the annual ASA budget. However, the organization is independent of the state and organized as a private, not-for-profit corporation.

The Arizona Students' Association supports SASU in its efforts to ensure the rights of students living in dormitory residences.

CALIFORNIA STATE STUDENT ASSOCIATION

Founded in 1959, the California State Student Association represents the 350,000 students attending the nineteen campuses of the California State University system. The organization is funded by the students it represents. CSSA seeks to advance the quality of higher education in California by serving as a responsible advocate of CSU students' needs and concerns. The organization is actively involved within the CSU system and the California State Legislature in advocating for the interests of students in the development of systemwide policy, the California State Budget and Legislative issues. CSSA promotes issues that are responsive to the needs of CSU students.

As an advocate of students' rights, CSSA supports this lawsuit as it applies to numerous legal issues that are paramount to the protection of student rights at campus institutions. Within the CSU system, individual campuses establish criteria relating to invited visitors, with such regulations contained in the housing lease agreement signed by a student. Guests who use the students' facilities must receive prior approval by the university president. CSSA believes any requirements which limit a student's rights to free association are detrimental to the individual affected, as well as the institution, and are contrary to rights granted in the U.S. Constitution regarding free association and freedom of speech. CSSA is of the opinion that dormitory residences are private domiciles, with students afforded all rights and privileges associated with private dwellings, without intervention by university institutions or administrative personnel.

COLORADO STUDENT ASSOCIATION

The Colorado Student Association represents 75,000 students in public institutions of higher education, on 10 member campuses in Colorado. Founded in February 1988, the organization is funded by the students it represents. CSA's purpose is to promote unity and cooperative efforts between member institutions by maintaining open lines of communication throughout the state. Also, CSA is established to insure the rights of students as full and equal citizens and to actively promote the collective interest of its members.

As an advocate of students' rights, CSA joins the Brief of Amicus Curiae of the Student Association of the State University of New York, Inc. CSA supports the fact that students, 18 years and older, are legal adults who in their place of residence should not be denied the U.S. constitutional rights regarding free association and freedom of speech.

CONNECTICUT STUDENT ASSOCIATION

The Connecticut Student Association (CSA) is the state student association of Connecticut representing public, private, community and technical colleges in the state. CSA represents 42 colleges and approximately 150,000 students. The organization is funded by the students it represents. The CSA exists to promote and improve higher education in the state and serves as an organized and informed advocate of the students. The CSA is actively involved with the Connecticut State University System, the State Board of Higher Education and the State Legislature voicing the interests and concerns of students.

Among the many services the CSA provides, one is of fundamental importance: ". . . to protect the individual rights of students as full and equal citizens." Therefore, CSA overwhelmingly opposes any University policy which seeks to deny a student's right to use his/her dormitory room as their own home to conduct any activity which is lawful and nondisruptive. Such action by a student is an exercise of free speech and freedom of association. The educational process is in no way disrupted; therefore, this constitutional right must not be infringed.

The CSA formally supports the Student Association of the State University of New York and the student respondents.

MICHIGAN COLLEGIATE COALITION, INC. STATEMENT OF INTEREST

The Michigan Collegiate Coalition, Inc. (MCC) was founded in 1984 and represents over 275,000 students of the 15 public universities in the State of Michigan including the students of the University of Michigan and Michigan State University. The MCC is a nonprofit, tax-exempt action organization.

The MCC functions to promote the interests of students in maintaining accessibility to higher education, protecting the individual rights of students as full and equal citizens, and encouraging student participation in the electoral process. To achieve these ends, the MCC lobbies the Legislature and the Executive Branch on behalf of students, represents students on various governmental and private educational agencies, litigates issues of students'

rights, and creates programs which benefit students of the 15 Michigan public universities.

The MCC's interest in this case is to avoid further encroachment upon the rights of students living in residence halls. The MCC believes that if the Supreme Court reverses the Second Circuit decision and hence the Federal District Court's decision on remand, universities in Michigan will establish stricter policies with regard to permissible student guests. The MCC believes that stricter policies are unnecessary in light of the proported university interests and students' free association and speech rights. The MCC wishes to ensure that students who live in residence halls have the same rights as students who live in any other off-campus setting.

To this end the MCC supports the position of student respondents in the within case.

In addition, the MCC wishes to inform the Court that the University of Michigan and Michigan State University have effective yet less restrictive policies regarding commercial guests than the policy in the SUNY system. With regard to commercial invitees, the University of Michigan policy provides that

> [s]olicitors may make or solicit sales in the [residence] halls only upon invitation of a resident student and only in that student's room. Any such transaction will be subject to the Michigan Home Solicitation Sales Act, MCLA 445:11 et seq. An individual student may invite a commercial seller to his/her residence hall room in order for the seller to disseminate (sic) information concerning its products to a group of other invited students. Sales may not be consummated at this time; students may make appointments

with the seller to make their purchases in their own rooms at a later date.

The MCC has received no complaints, nor has it noticed any problems suggesting that the University of Michigan's policy fails to prevent crime, protect against consumer exploitation, promote residential tranquility or promote education. In addition, the policy embodies the recognition students living in residence halls have the same rights of free association as their fellow students living in off-campus domiciles.

Michigan State University has no written residence hall policy specifically regulating a resident's ability to have a visitor with a commercial purpose. Residence hall officials allow students to have guests with a commercial purpose, but neither the resident nor the invitee is permitted to solicit from or advertise to other residents.

OREGON STUDENT LOBBY

The Oregon Student Lobby (OSL) was founded in 1976 by students enrolled in the Oregon State System of Higher Education. The purpose of the organization is to represent, advocate and further the interests of the students enrolled at the member campuses, primarily through conducting research and presenting information to the Oregon Legislature and other state and federal decision makers. OSL currently represents approximately 65,000 students enrolled at seven member campuses throughout Oregon. OSL is an independent nonprofit corporation which is funded from student incidental fees at each of the member campuses. The organization's activities are directed

by a fourteen member board of directors made up of two students from each member campus.

The Oregon Student Lobby Board of Directors supports the student respondents. Students on each of our member campuses live in residence halls (dormitories) and are subject to a variety of institutionally approved regulations which affect their right to conduct speech and association activities. OSL supports the right of students living in campus residence halls to be afforded all the rights and privileges afforded to those living in their own homes.

RUTGERS COLLEGE GOVERNING ASSOCIATION

The Rutgers College Governing Association was founded in 1975 for the purpose of representing the students of Rutgers College. It represents over 12,300 students on two campuses. It is funded by an activities fee accredited to each student, authorized by the University. RCGA joins with S.A.S.U. in support of the student respondents.

RUTGERS UNIVERSITY LEGISLATIVE AFFAIRS COUNCIL

The Rutgers University Legislative Affairs Council was founded in 1984 to preserve the rights of students at Rutgers, the State University of New Jersey, at its New Brunswick campus. The Council is a joint sub-committee of the several student governments in New Brunswick, and represents over 25,000 students as a result of this status. The specific scope of this organization is to protect student rights through influencing public bodies, and where necessary, intervening in legal actions.

RULAC recognizes the positive steps that have been taken in recent years by eliminating *in loco parentis* regulations, and believes that a favorable decision for the respondent in this case would further this obvious student goal.

Cases throughout the last 20 years in the Court, e.g. *Tinker v. Des Moines, Healy v. James,* and other first amendment cases have affirmed the constitutional rights of students, especially the adult college students who have full legal status. A favorable decision here would be a logical extension of these cases.

For the reasons set forth above, the Rutgers University Legislative Affairs Council joins the SASU brief and urges a decision affirming the Second Circuit decision.

UNITED COUNCIL OF UNIVERSITY OF WISCONSIN STUDENT GOVERNMENT, INC.

United Council of UW-Student Governments was formed in 1960 and is the oldest student association in the nation. United Council is a research and advocacy organization for students in Wisconsin.

The United Council was formed pursuant to Wisconsin State Statute 36.09(5), which states that students "shall be active participants in the immediate governance of and policy development for such institutions." The statute also states that "students of each institution or campus have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance."

United Council represents students before the Governor, Legislature, UW-Board of Regents and other pertinent governing bodies.

United Council supports the student respondents.

UNIVERSITY OF CALIFORNIA STUDENT ASSOCIATION

The University of California Student Association endorses and supports the position of the student respondents in the above-captioned case.

The University of California Student Association was founded in 1971 and represents the 155,000 students at the nine campuses of the University of California system.

The functions of the organization are to represent, advocate, and further the interests and welfare of the students of the University of California.

This Association believes that colleges and universities have no compelling interest in censoring the nondisruptive exercise of free speech and freedom of association by students, regardless of whether the students' homes are on or off university property. Several campuses within the University of California system do not have policies comparable to that of the State University of New York, and their educational mission has not been compromised.

The University of California Student Association has reviewed the Amicus Brief of SASU, and adopts that Brief as the position of this Association.